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84-143

No. _____

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1983

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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July, 1984

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

119 pp

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Federal Constitution prohibit a state legislature from defining language in an obscenity statute by Supreme Court case law rather than the A.L.I. Model Penal Code definition?

a. Did the *Roth v. United States*, 354 U.S. 476 (1957) definition of "prurient" permit the use of the word "lust"?

b. Did *Miller v. California*, 413 U.S. 15 (1973) and its progeny overrule *Roth* in establishing the first leg of the tripartite test of obscenity?

2. Should a federal court invalidate a state obscenity statute on the basis of facial overbreadth when state court decisions have held that a limiting construction must be placed on a state obscenity statute?

a. Should a federal court leave to state court the construction of a newly-enacted state obscenity statute when the State Supreme Court has by case law declared the *Roth-Miller* test to be the law of construction in state obscenity cases?

b. Should a federal court leave to state court a narrowing construction of terms in an obscenity statute when the State Supreme Court has adopted the same construction used by the federal courts in construing federal obscenity statutes involving similar terms?

PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 725 F.2d 482 (1984), and is reproduced as Appendix A. The opinion of the United States District Court, Eastern District of Washington is reported at 544 F.Supp. 1034 (1982), and is reproduced as Appendix B.

JURISDICTION

This appeal is taken from a judgment of the Court of Appeals for the Ninth Circuit which invalidated, *in toto*, a Washington state anti-obscenity statute on the ground

that the statute's definition of the term "prurient" by including the word "lust" in the definition rendered the Act unconstitutional under *Miller v. California*, 413 U.S. 15 (1973). The Court of Appeals, 2-1 decision, reversed the District Court for the Eastern District of Washington which had held that the Washington statute complied with *Miller*.

Jurisdiction of the district court was conferred by 28 U.S.C. § 1331, and jurisdiction of the Court of Appeals was exercised under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3).

The Court of Appeals judgment was entered February 6, 1984 and is included as Appendix C. The order denying rehearing was entered April 6, 1984 and is attached as Appendix D. A notice of appeal was filed in that court on June 21, 1984 and an amended notice of appeal was filed on June 25, 1984, each attached as Appendix E and F. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment of the United States Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacibly to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, § 1 of the United States Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626 is reproduced as Appendix G.

STATEMENT OF THE CASE

A. Washington's Statutory System

The 1982 Washington State Legislature enacted House Bill 626 and it was signed into law by the Governor on April 1, 1982. (Wash. Sess. Laws, ch. 184, 47th Legis., HB 626 (see Appendix G.))[1] The statute established civil and criminal penalties for maintaining a "moral nuisance." On April 5, four days after HB 626 was signed by the Governor, appellees J-R Distributors, Inc. and Azure Entertainment Corporation of Washington filed separate suits challenging the constitutionality of the Act in the United States District Court for the Eastern District of Washington. Subsequently, five other plaintiffs filed separate suits, all seven cases being consolidated by the District Court. On April 13, prior to any actions under the Act, the District Court issued a preliminary injunction against enforcement of the Act by appellants.

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[1]The main definition found in the state statute is that of lewd matter:

"(2) 'Lewd matter' is synonymous with 'obscene matter' and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions; or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value." Appendix G-1, § 1(2).

The civil portion of House Bill 626 declared as "moral nuisances" certain described places having lewd films or publications. Any person who, with knowledge, maintained a "moral nuisance" as described could be made the subject of a civil action with civil penalties to be judicially determined. The criminal portion of the Act made the promotion of pornography by any person who, with knowledge and for profit-making purposes, sold, exhibited, displayed or produced lewd matter a Class C felony.

House Bill 626 contained a definition of "lewd matter," synonymous with "obscene matter" consistent with the conjunctive tripartite test set forth in *Miller*. The term "prurient" used in the first prong of the *Miller* tripartite test was further defined by the state Act by a definition which included the use of the term "lust."[2]

B. The Rationale of the Decision Below.

The Court of Appeals in a 2-1 decision held HB 626 unconstitutional, *in toto* because the word "lust" was included in the definition of "prurient."[3] As the court viewed it, this inclusion of the term "lust" was unconstitutional for three reasons:

First. The circuit court majority gave lip service to this Court's statement that " 'material having a tendency to excite lustful thoughts' was a definition of material 'appealing to prurient interest' " (Appendix A-17; *Roth v. United States*, 354 U.S. 476, 487 n. 20 (1957)). But the court nevertheless read *Roth* as sanctioning only the A.L.I. Model Penal Code definition of "prurient," which does not use the term "lust" or "lustful," and therefore invalidated any statutory definition using those terms.

Second. The court below found the use of "lust" con-

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[2]"Prurient means that which incites lasciviousness or lust." Appendix G, § 1(8).

[3]In dictum, the Court of Appeals also held the civil penalties portion of the statute unconstitutional for allowing a fine to be based, even in part, on proceeds from constitutionally protected material. This section of the statute, as noted in the dissenting opinion, is severable, allowing the rest of the Act to remain intact.

stitutionally impermissible because of its changing meaning in contemporary usage. By way of example, the court noted that a post-*Roth* dictionary definition of "prurient" no longer included the term "lust," and that a presidential candidate in a 1976 *Playboy* interview admitted having looked upon women with "lust." The Court observed that certainly "lust" could not have an evil connotation if a presidential candidate would publicly admit having had it in his heart.[4]

Finally, the court concluded that, no matter how one construed the *Roth* definition of "prurient," *Miller* had replaced the *Roth* definition, and, as a result, the only presently acceptable definition of "prurient" is that provided in the A.L.I. Model Penal Code.

Thus, the court declared the Washington Legislature's definition of "prurient" unconstitutional, found it unseverable from the rest of the Act, and refused to allow a state court to find a fixed, constitutionally permissible meaning for the terms "lust" and "prurient."

The dissent in the court below concluded that the statutory definition of "prurient" cannot be held unconstitutional because it is based on this Court's precedent, *i.e.*, *Roth*. With respect to the *Roth* definition, the dissent concluded that the *Roth* footnote should be read as a whole; it describes different, yet equally acceptable ways to define the term "prurient." The dissenting judge also addressed the concern of changing definitions by emphasizing the criteria of "contemporary community standards" found in the first prong of the *Miller* tripartite test. He noted that purely legal definitions are more dependent on the Supreme Court than on a particular edition of a dictionary or an interview in *Playboy* magazine. Lastly, the dissent concluded that *Miller* affirmed a "judicial meaning" of pruri-

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[4]The dissenting judge observed that purely legal definitions are less dependent on an interview in *Playboy* magazine than on the Supreme Court. Further, the judge noted that the majority had misinterpreted the views of the presidential candidate who "* * * characterized lust as a sin requiring divine forgiveness, not as something 'acceptable' in our community." Appendix A-38; *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 501 (1984).

ent derived from *Roth* and that this Court had never held that the A.L.I. Model Penal Code provided the only acceptable definition. Thus, the dissent found the statutory definition of "prurient" constitutional — adding that, "at worst" the use of "lust" was subject to state court construction in light of *Miller*.[5]

The court below thus fashioned a legal ambush for the Washington Legislature. Having tracked the definition of this Court, it ran afoul of a "changing definition standard" here fashioned by the Court of Appeals.

C. Record Identification of the Question Presented.

The abstention question presented in this appeal was first raised in the Consolidated Memorandum of Authorities in Response to Plaintiffs' Memorandum submitted to the District Court May 18, 1982 which also incorporated the Memorandum of Authorities submitted on the same date by appellant Brockett wherein the question is also raised. The District Court did not abstain because it concluded the statute was constitutional. On appeal to the Court of Appeals, the Consolidated Brief of Appellees (appellants herein) first raised the argument at page 8, under the heading "1. Overbreadth."

The overbreadth question presented in this appeal was first raised in the Memorandum of Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction submitted to the District Court April 6, 1982 and filed by appellees J-R Distributors, Inc. and Azure Entertainment Corporation of Washington. While the District Court granted the motion, in its ultimate decision entered July 2, 1982, the court concluded that the definition of "prurient" in the statute was constitutional. On appeal to the Court of Appeals, the brief of the afore-

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[5]The District Court found the challenge to the definition subjected the court to "semantical nit picking" which was avoided when one looked at the definition of obscenity as a function of the conjunctive tripartite test rather than the single statutory section defining "prurient." Appendix B-10; *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1034, 1038 (E.D. Wash. 1982).

mentioned appellees raised the question at page 3, under the heading "Statement of Issues." The Court of Appeals in a 2-1 decision, reversed the district court, resolving the question adversely to the State of Washington.

THE FEDERAL QUESTION IS SUBSTANTIAL

The federal question is substantial and merits the noting of probable jurisdiction for two reasons. First, the decision of the Court of Appeals for the Ninth Circuit is in irreconcilable conflict with *Roth* and the "judicial meaning" of prurient set forth in *Miller* and derived from *Roth*. The changing definition standard adopted by the court below is not one which has been adopted by this Court itself. The confusion arising from this conflict would be compounded, not diminished, by a per curiam affirmance of the Court of Appeals in this case. State legislatures should not be caught in a legal ambush for having drafted legislation tailored to Supreme Court precedent such as *Roth*.

Secondly, a practical but fundamental question of federalism is here involved, *i.e.*, the respective roles of federal and state courts in dealing with state anti-obscenity statutes. Simply put, are such statutes to be struck down simply because the purveyors of obscene materials rush to the federal statute, and preclude a state court from giving a narrower and constitutionally permissible reading? Does the normal principle that *state* courts are to give the final reading of state statutes drop out of the picture when anti-obscenity statutes are involved?[6]

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[6]Note, in this regard, the practical importance of the issuance of a preliminary injunction by a federal court against enforcement of a state obscenity statute. It precludes state authorities from obtaining a reading of the statute in state courts through any enforcement action. In any race to the court house, state authorities cannot even leave the starting line. This does not mean that preliminary injunctions are improper in cases such as this; rather, it shows the practical importance of federal courts allowing state courts to construe such statutes through procedures other than an actual enforcement action; *e.g.*, through certification to state courts of questions of state law (Washington state certification procedure is found at Rev. Code Wash. ch. 2.60). See pp.

We briefly take up these two points.

I. The Decision of the Court of Appeals is in Conflict with Roth v. United States, 354 U.S. 476 (1957) and Miller v. California, 413 U.S. 15 (1973).

While obscenity is not protected by the First and Fourteenth Amendments, defining what is obscene has been a long and arduous undertaking. *Miller v. California, supra; Roth supra.*[7] However, this Court has agreed on a "judicial meaning" for obscenity, known as the *Roth-Miller* test. After *Roth* in 1957 and prior to *Miller* in 1973, this Court in *Redrup v. New York*, 386 U.S. 767, 770-771 (1967) appeared to adopt a procedure which placed the Court in the role of an unreviewable board of censorship for the 50 states. In *Miller* this Court set basic guidelines for states which, if provided by state statute "as written or construed," would allow the federal courts to assume the role of an independent reviewer of constitutional claims. *Miller, supra* at 25. The Washington state statute at issue tracks the tripartite test adopted in *Miller.*

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,

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13-15, *infra*. For reasons there discussed, we have little doubt that the Washington Supreme Court would give the key terms in this case, "lust" and "prurient," a constitutionally valid construction. And we also have little doubt that appellees were quite aware of this, and accordingly have adopted a strategy — so far successful — of trying to ensure that Washington courts are cut off from any opportunity to construe this statute.

[7] "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards,' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *' " *Roth, supra* at 491-492, citing *United States v. Petrillo*, 332 U.S. 1, 7, 8 (1947); see also *Miller, supra*, at 27 n. 10.

> *Kois v Wisconsin*, supra, at 230, quoting *Roth v United States*, supra, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller, supra* at 24.

The first requirement of the test was established in *Roth*, reaffirmed in *Miller*. The Washington statute tracks it almost exactly.[8] Appendix A-16; *J-R Distributors, Inc. v. Eikenberry, supra* at 490. Nonetheless, the Ninth Circuit Court in its 2-1 decision found the use of the statutory term "lust" in defining "prurient" to be overbroad, rendering the entire statute unconstitutional.[9] Such a conclusion is in clear conflict with *Roth*.

In *Roth* and its companion case, *Alberts*, the Court considered (in a single decision) the constitutionality of a state and a federal obscenity statute. Alberts appealed a California criminal conviction while Roth appealed a federal criminal conviction, each conviction being based on obscenity statutes. The *Roth* decision noted that the trial judge in the California prosecution had utilized the test set forth in a state court decision, *i.e.*, whether the "material has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or *arousing lustful desires.*" *Roth, supra* at 486. (Emphasis added).[10] Similarly, in the federal prosecution, the district court instructed the jury:

> "The words 'obscene, lewd or lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to *incite lustful thoughts.*" *Roth, supra* at 486 (Emphasis added).

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[8]See footnote 1.

[9]"Prurient means that which incites lasciviousness or lust" [Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(8). See also Appendix G-2, § 1(8).

[10]*People v. Wepplo*, 78 Cal.App.2d Supp. 959, 961, 178 P.2d 853 (1947). "A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or *arousing lustful desires.*' " (Emphasis added).

This Court decided that both trial courts used the proper definition of obscenity, each of which included the word lustful. *Roth, supra* at 489.

The Court of Appeals majority in this case nonetheless found "*Roth* actually concluded with the A.L.I. Model Penal Code definition" which did not include "lust." Appendix A-17; *J-R Distributors, Inc. v. Eikenberry, supra* at 490.

It is true that a footnote in *Roth, supra* at 487, n. 20, defining the term "prurient interest," concluded with the A.L.I. Model Penal Code definition.[11] But since it was only the last one quoted, it cannot be said that this Court thus declared it to be the only acceptable definition. Nonetheless that is what the Court of Appeals here found. The "judicial meaning" *Miller* refers to, derived from *Roth*, is a recognition of the case law. The A.L.I. Model Penal Code definitions provide a statutory definition which is judicially acceptable. *Roth, supra,* at 487 n. 20; *Miller, supra* at 18-19 n. 2.

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[11] "I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines *prurient*, in pertinent part, as follows:

"* * * Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. * * *"

Pruriency is defined, in pertinent part, as follows:

"* * * Quality of being prurient; lascivious desire or thought. * * *"

See also Mutual Film Corp. v. Industrial Com. 236 US 230, 242, Ann Cas 1916C 296, where this Court said as to motion pictures: "* * * They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* * * *"

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent Draft No. 6, 1957), viz.:

"* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *" See comment, id., at 10, and the discussion at pages 29 et seq." (Emphasis added)

> "* * * there is a significant distinction between the definition used in the prosecutions before us, and the American Law Institute formula. If, therefore, the latter is the correct standards, as my brother Brennan elsewhere intimates, then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri." *Roth, supra* at 500, Harlan, J. concurring in the result in No. 61 (Alberts), and dissenting in No. 582 (Roth) (footnote omitted).

Subsequent to *Miller*, this Court remanded a case involving a challenge to the Nebraska obscenity law, for construction in light of *Miller*. *Little Art Corp. v. State of Nebraska*, 414 U.S. 992 (1973). On remand, the Nebraska State Supreme Court found the Nebraska law fully complied with the requirements of *Miller*. That law allows for either of the definitions of "prurient interest" noted in *Roth*.

> "* * * Appeals to the prurient interest, which is to *excite lustful thoughts*, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor." *State v. Little Art Corp.*, 191 Neb. 448, 451, 215 N.W.2d 853 (1974) (emphasis added).

Subsequently, this Court reviewed and dismissed an appeal from the Ohio Supreme Court involving an obscenity statute, *Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923 (1975), which defined obscenity to include "a dominant tendency to arouse lust * * *" *Id.* at 923.[12]

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[12]The full Ohio statutory definition was as follows:

"'(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to *arouse lust* by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to *arouse lust* by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or description of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the

The Washington Legislature, in adopting the statute here at issue, followed the option provided by this Court in choosing between the case law *or* the A.L.I. Model Penal Code constitutionally-acceptable definitions of obscenity. In turn, having used this Court's case law definition (with which two judges of the Court of Appeals disagree) Washington has now had its entire statute declared unconstitutional. This appeal thus involves an important application of this Court's decisions in *Roth* and *Miller*, neither of which has been overruled, and should govern this case.

The appellate court mistakenly relied on language in a *Playboy* magazine interview and changing dictionary definitions. Appendix A-18, 10; *J-R Distributors, Inc. v. Eikenberry, supra* at 490-491. The changing of the meaning of words through contemporary usage is not relevant because changing attitudes in the society are addressed by the contemporary community standards set forth in the first of the tripartite test in *Miller*. Appendix A-38; *J-R Distributors, Inc. v. Eikenberry*, Wallace dissent, *supra* at 501. The definition of obscenity does not simply rely on matter appealing to prurient interest, *i.e.*, that "which incites lasciviousness or lust." It is modified not only by the contemporary community standard but "the three elements of the test (*Miller*) must coalesce before material may be proscribed as 'obscene.' "[13] *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 594, 512 P.2d 1049 (1973); Appen-

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cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, education, sociological, moral, or artistic purpose.' " (Emphasis added)

[13]The court below overlooked not only the contemporary community standard but the necessity that the three elements of the test are applied conjunctively. This is evidenced by the court's reference to the fact that "* * * leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles, * * *" might be subject to the Act. Such would be the case only if the questioned matter explicitly depicted or described patently offensive representations or descriptions as set forth by the state statute in the second prong of the tripartite test *and* the other two prongs of the test were likewise applicable. Appendix A-11; *J-R Distributors, Inc. v. Eikenberry, supra* at 492.

dix B-10; *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1034, 1038 (E.D. Wash. 1982).

The conflict between the Court of Appeals decision and *Roth-Miller* is irreconcilable. Further, the changing definition standard set forth by that court has not and should not be adopted by this Court. The Washington Legislature drafted the 1982 obscenity statute in compliance with Supreme Court precedent only to be caught in the legal ambush presented by the Court of Appeals. State legislators must be able to rely and be guided by Supreme Court precedent. The practical resolution to this problem is the next important issue to be addressed.

II. Facial Overbreadth Should Not be Used to Invalidate State Legislation when a Limiting Construction could be or has been Placed on a State Obscenity Statute.

In *Miller* this Court made clear that the role of the federal courts was to review constitutional claims *when necessary*. To this end the *Miller* decision (1) provided basic guidelines, a tripartite test, for defining obscenity and (2) emphasized the importance of construction of state obscenity laws by the states. *Miller, supra* at 24-25, 24 n. 6. The commitment to leave construction of state obscenity laws to state courts was reemphasized in *United States v. 12 200-FT. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973) wherein this Court stated "* * * We *must* leave to state courts the construction of state legislation * * *." (emphasis added). Facial overbreadth is not an exception, it is to be employed by the federal courts sparingly and "* * * only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). "Facial overbreadth has not been invoked when a limiting construction *has been or could be* placed on the challenged statute." *Id.* at 613 (emphasis added).

In the instant proceeding a state obscenity statute was challenged in federal court four days after it became effective (April 1, 1982). An injunction was issued so no

actions have been filed and state courts have not had the opportunity to construe the statute.

The Washington Supreme Court has previously made clear that it would comply with the direction in *Miller* and authoritatively so construe state obscenity statutes. *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 594, 512 P.2d 1049 (1973). The state court there recognized that *Roth* remained viable and basic to the holdings in *Miller* and its progeny. *Id.* at 600. Thus, in answer to an overbreadth challenge to the definition of obscenity, the Washington Supreme Court construed the statute in accordance with the *Roth-Miller* test. *Id.* at 601-602.

The policies of federalism and comity require that the state court here similarly be given the opportunity to first construe a state obscenity statute and then leave to the federal court the review of any remaining constitutional claims if necessary. *Miller, supra* at 25. State courts' construction has been used and affirmed by the federal courts since the policy set forth in *Miller*.[14] The Washington Supreme Court, when given the opportunity, has construed a state obscenity statute consistent with *Roth-Miller* and there is no reason to doubt that a similar construction would occur regarding the statute at issue herein.

Assuming, *arguendo*, the statutory definition of "prurient" is subject to an overbreadth challenge, it is capable of a narrowing state judicial construction consistent with *Miller*. This Court noted its duty to authoritatively construe federal statutes where a "serious doubt of constitu-

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[14] *Fehlhaber v. North Carolina*, 675 F.2d 1365 (4th Cir. 1982); see also *Ward v. Illinois*, 431 U.S. 738 (1977) where this Court found the state court plainly intended to conform to *Miller* and there was no reason to doubt it. Similarly, in a challenge to the Wisconsin statute, the Supreme Court of that state construed the state law consistent with *Miller*. *State ex rel. Chobot v. Circuit Court*, 61 Wis.2d 354, 212 N.W.2d 690 (1973). Nonetheless, the federal court ruled the statute unconstitutionally vague under *Miller*. *Amato v. Devine*, 496 F.2d 441 (7th Cir. 1974). On appeal this Court vacated the judgment and remanded in light of the state court construction in *Chobot*. *Devine v. Amato*, 419 U.S. 1014 (1974). The federal appellate court then held the statute constitutional in light of the state court's construction. *Amato v. Devine*, 558 F.2d 364 (7th Cir. 1977).

tionality is raised." *United States v. 12 200-FT. Reels of Film, supra* at 130 n. 7. Specifically, with respect to words such as "obscene," "lewd" or "lascivious" the Court has said:

> "[W]e are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hardcore" sexual conduct given as examples in *Miller*." *Id.* at 130 n. 7 (citation omitted)

The Washington statute at issue specifically adopts the examples set forth in *Miller*. See Appendix G-1, § 1(2)(b)(i), (ii). *Miller, supra* at 25. Further, the State Supreme Court has noted and adopted the construction set forth in *12 200-FT. Reels of Film. State v. J-R Distributors, Inc., supra* at 601 n. 3. Thus, this Court has recognized an acceptable narrowing construction to be applied herein which is the same judicial approach to construction of obscenity statutes adopted by the Washington State Supreme Court.

The Washington statute is capable of a narrowing construction and the Washington Court has, in the past, adopted that construction when required to comply with the *Roth-Miller* test. Consistent with *Miller*, this statute should be construed by the State Court to avoid the past practice of federal courts acting as boards of censorship.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted, and the decision of the Court of Appeals reversed.

DATED this _____ day of July, 1984.

Respectfully submitted,

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Deputy Attorney General

Additional Appellants:

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J-R DISTRIBUTORS, INC.,
Plaintiff-Appellant,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington, Jeffrey C. Sullivan, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and Fred Andrews, in his official capacity as City Attorney for the City of Yakima, Washington, Defendants-Appellees.

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,
Plaintiff-Appellant,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington, Defendants-Appellees.

JACK R. BURNS, in his representative capacity as Executor of the Estate of Selom F. Burns, Plaintiff-Appellant,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Defendant-Appellee.

PLAYTIME THEATRES, INC. a
Washington Corporation,
Plaintiff-Appellant,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative

capacity, only, Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only, and James Sloane, Spokane City Attorney, in his representative capacity only, Norm Maleng, Prosecuting Attorney of King County in his representative capacity only, Defendants-Appellees.

KUKIO BAY PROPERTIES, INC., a Washington Corporation, Plaintiff-Appellant,

v.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only, Defendant-Appellee.

SPOKANE ARCADES, INC., a Washington Corporation, Plaintiff-Appellant,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only, and James Sloane, Spokane City Attorney, in his representative capacity only, Defendants-Appellees.

The AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; Madrona Publishers, Inc., Superior Publishing Company; Washington Library Association; Pacific Northwest Booksellers Association; Motion Picturers Exhibitors of Washington, Alaska, and Northern Idaho; Washington State Council of Teachers of English; Washington Library Media Association; and The Community College Librarian and Media Specialists Association of Washington, Plaintiffs-Appellants,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Defendant-Appellee.

Nos. 82-3441, 82-3442 and 82-3500
through 82-3504.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 6, 1983.
Decided Feb. 6, 1984.

Challenges were brought to Washington antiobscenity statute. The United States District Court for the Eastern District of Washington, Robert J. McNichols, Chief Judge, 544 F.Supp. 1034, upheld the statute and appeal was taken. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) facial challenge was proper; (2) there was no basis for abstention; (3) definition of "prurient" which included "lust" was unconstitutional; and (4) provision of statute imposing fine based upon all sales from place where moral nuisance occurred, including sales of protected material, was unconstitutional.

Reversed.

Wallace, J., dissented and filed an opinion.

1. Constitutional Law — 42.1(3)

Civil liberties organization would have standing to sue over constitutionality of antiobscenity statute if any of its members suffered or was threatened with injuries which would create a justiciable case.

2. Federal Courts — 45, 813

Forum non conveniens determination is committed to the sound discretion of the trial court which will be reversed only where there has been an abuse of discretion.

3. Federal Courts — 101

Evidence sustained finding that interests of the parties, convenience to the attorneys, judicial economy, and public interest would be served by disposing of various challenges to antiobscenity statute in a single hearing already scheduled in a case in another district and that instant case should be transferred to that district on forum non conveniens grounds.

4. Federal Courts — 13

Facial challenge to constitutionality of antiobscenity statute was proper.

5. Federal Courts — 13

In evaluating facial challenge to constitutionality of statute, court must consider whether there are any readily apparent constructions capable of saving the statute, in a single state prosecution, from the constitutional challenges presented in federal court.

6. Federal Courts — 813

Reviewing court will reverse the district court on the issue of abstention only when there has been an abuse of discretion.

7. Federal Courts — 43

In order for *Pullman* abstention to be appropriate, federal court must find that suit touches sensitive area of social policy into which federal courts ought not to enter unless no alternative for adjudication exists, that a definitive ruling on the state issues in question would end the controversy, and that the possibly determinative issue of state law is doubtful.

8. Federal Courts — 43

In view of fact that several key provisions of antiobscenity statute were not susceptible to saving constructions, *Pullman* abstention was inappropriate.

9. Federal Courts — 43

Burford abstention was not appropriate with respect to facial challenge to antiobscenity statute.

10. Federal Courts — 43

In the absence of any state criminal or civil action having been instituted under antiobscenity statute, *Younger* abstention was not proper with respect to federal court challenge to the constitutionality of the statute.

11. Constitutional Law — 90.1(8)

To assure that protected speech is not impermissibly regulated, even subtle deviations from the *Miller* standards must be carefully examined.

12. Constitutional Law — 90.1(1)
Obscenity — 2.5

Washington antiobscenity statute which defined "prurient" as "that which incites lasciviousness or lust" was unconstitutional because of the inclusion of "lust" in the definition of "prurient." West's RCWA 7.48.050(2)(a).

13. Constitutional Law — 90.1(1)
Obscenity — 5.1

Expressions which may merely stimulate sexual longing or desire are entitled to the full range of First Amendment protections and cannot be constitutionally branded as obscene. U.S.C.A. Const.Amend. 1.

14. Obscenity — 2.5

Because antiobscenity statute unconstitutionally infringed on protected expression, the entire statute was unconstitutional.

15. Obscenity — 2.5

It is impermissible, in an antiobscenity statute, to provide that the amount of a fine shall be based, even in part, on proceeds from constitutionally protected material; statute which defined nuisance as the place where obscene items were sold and which directed that the total profits from that place be taken into consideration when imposing a fine was unconstitutional. West's RCWA 7.48.050.

John H. Weston, David M. Brown, G. Randall Garrou, Brown, Weston & Sarno, Beverly Hills, Cal., Carl Maxey, The Maxey Law Firm, Spokane, Wash., for plaintiffs-appellants.

Debbie D. Carnevali, Adm. Asst. Deputy Atty. Gen., Christine Gregorie, Deputy Atty. Gen., Olympia, Wash., for defendants-appellees.

Richard C. Robinson, Spokane, Wash., for James C. Sloane.

David A. Saraceno, Spokane, Wash., Robert Eugene Smith, Encino, Cal., Charles S. Hamilton, III, Seattle, Wash., for Donald C. Brockett.

Appeal from the United States District Court for the Eastern District of Washington.

Before GOODWIN, WALLACE, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Plaintiffs in these consolidated appeals challenge the constitutionality of Washington state's comprehensive anti-obscenity statute. Plaintiffs contend that various provisions of the statute are unconstitutionally overbroad or vague; that the statute's definition of obscenity varies impermissibly from that established by the Supreme Court; that the statute's penalty provisions and lack of procedural safeguards serve to chill protected first amendment expression; and that the sanctions imposed by the statute violate the eighth amendment's prohibition against cruel and unusual punishment. After a trial on the merits, the district court rejected plaintiffs' challenges and refused to enjoin enforcement of the statute. We find that the anti-obscenity statute is unconstitutional and reverse.

BACKGROUND

In 1977 the voters of the state of Washington adopted an initiative measure that established procedures to temporarily and permanently enjoin the operation of moral nuisances. Wash.Rev.Code §§ 7.48.050-100 (West.Supp.1980). In a decision affirmed by the Supreme Court, we found that this moral nuisance law was unconstitutional because it failed to provide procedural safeguards necessary for the protection of first amendment freedoms. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 137-39 (9th Cir.1980), *aff'd*, 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981).

Apparently in response to the fact that the voters' initiative measure had been declared unconstitutional, the Washington state legislature enacted into law the statute that plaintiffs challenge here. This statute, known as House Bill 626,[1] establishes a dual system of civil and

[1] The relevant portions of House Bill 626 are reprinted in the Appendix to this opinion.

criminal penalties for those who maintain "moral nuisances" as defined in Section II.

[1] House Bill 626 became effective on April 1, 1982. On April 5, 1982, plaintiffs J-R Distributors and Azure Entertainment Corporation filed separate suits in the United States District Court for the Eastern District of Washington. These suits, brought pursuant to 42 U.S.C. § 1983 (Supp. IV 1980), sought declaratory and injunctive relief against the statute's enforcement. Subsequently, the five other plaintiffs filed similar law suits. All seven cases were consolidated by the district court.[2]

On April 13, 1982, the district court issued a preliminary injunction against enforcement of House Bill 626. The case proceeded to trial before the district judge, and on July 2, 1982, the court rejected plaintiffs' challenges and affirmed the constitutionality of House Bill 626. *Spokane Arcades, Inc. v. Eikenberry,* 544 F.Supp. 1034 (E.D.Wash. 1982). Although the district judge denied plaintiffs' motion for an injunction pending appeal, he did stay his judgments to allow plaintiffs to seek a stay pending appeal from this court. Ninth Circuit Rules of Appellate Procedure, Rule 6(i). On October 13, 1982, we granted

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[2] Throughout these proceedings, various objections have been raised to the standing of a few of the many plaintiffs in the seven consolidated cases. *See, e.g., Spokane Arcades, Inc. v. Eikenberry,* 544 F. Supp. 1034, 1037 n. 1 (E.D.Wash.1982). In particular, the standing of the American Civil Liberties Union as a plaintiff in one of the cases has been challenged before this Court. The district court's opinion was that "[i]n view of the disposition of this matter, . . . the question is largely academic." *Id.* We share that view. *See generally Havens Realty Corp. v. Coleman,* 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), *quoting Taggart v. Weinacker's, Inc.,* 397 U.S. 223, 225, 90 S.Ct. 876, 877, 25 L.Ed.2d 240 (1970) (per curiam); *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Gulf Oil Co. v. Federal Regulatory Commission,* 706 F.2d 444 (3d Cir. 1983).

It is worth noting however, that the ACLU has standing to sue in this case if any one of its members suffers or is threatened with injuries that would create a justiciable case. *See generally Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Black Faculty Association v. San Diego Community College,* 664 F.2d 1153 (9th Cir.1981). Because we find that House Bill 626 is unconstitutionally overbroad, it seems likely that some of the ACLU's members would be affected by the statute's impermissible restrictions on protected speech.

the motions of plaintiffs J-R and Azure and enjoined the enforcement of House Bill 626 pending resolution of this appeal.

[2, 3] We exercise jurisdiction under 28 U.S.C. § 1331 (1976), because plaintiffs' claims raise federal questions, and under 28 U.S.C. § 1343(3) (1976), because plaintiffs allege civil rights violations under section 1983.[3]

FACIAL CHALLENGES TO ALLEGEDLY UNCONSTITUTIONAL STATUTES

Plaintiffs' constitutional attacks on House Bill 626 were launched almost immediately after the statute became effective. Prior to trial, the district court issued an injunction against enforcement of the statute, and we have done the same for the pendency of this appeal. Conse-

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[3] King County Prosecuting Attorney Norm Maleng, a defendant to two of the suits being appealed, raises several objections to the district court's assertion of jurisdiction over him. First, Maleng argues that venue in the *Kukio Bay Properties* case was improperly transferred from the Western District of Washington, where Maleng performs his official duties, to the Eastern District of Washington, where the various other lawsuits were filed. *See* 28 U.S.C. § 1404(a) (1976). We disagree. The *forum non conveniens* determination is committed to the sound discretion of the trial court. We will reverse such a determination only when there has been an abuse of discretion. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). *See also Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32, 75 S.Ct. 544, 546-547, 99 L.Ed. 789 (1955) (trial court has more discretion to transfer to another federal court pursuant to § 1404(a) than to dismiss on grounds of *forum non conveniens*). In this case, the district judge for the Western District of Washington correctly found "that the interests of the parties, convenience to the attorneys, judicial economy, and the public interest are all served by disposing of this matter in one hearing" already scheduled in the Eastern District of Washington.

Second, Maleng contends that the plaintiff in the *Playtime Theaters* suit owns no theaters or bookstores in King County and thus could not possibly be subject to prosecution by him. In its brief to this court, however, Playtime Theaters, Inc. asserts that it "is a body corporate of the state of Washington operating 35 mm. motion picture theaters in various counties in the State of Washington exhibiting adult film fare to the adult citizens of and/or visitors to the State of Washington." King County is not, however, specifically mentioned as one of these counties. The trial judge, after "being fully appraised of the parties' respective positions," ordered that Playtime "be granted leave to amend its complaint only to the extent necessary to join Norm Maleng . . . as an additional defendant." In light of our resolution of this case, we see no present need to decide this factual dispute.

quently, Washington state, county and city officials have not yet had the opportunity to enforce House Bill 626.[4] Plaintiffs' suits thus constitute facial challenges to a statute that has yet to be authoritatively interpreted or enforced.

The Supreme Court has consistently entertained facial challenges when first amendment rights have been at stake. As Justice Marshall recently emphasized, the Supreme Court has "repeatedly recognized that a statute which sweeps within its ambit a broad range of expression protected by the First Amendment should be struck down on its face." *United States v. Grace*, —— U.S. ——, ——, 103 S.Ct. 1702, 1712, 75 L.Ed.2d 736 (1983) (Marshall, J., concurring in part and dissenting in part) (footnote omitted). *See, e.g., United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 609-610, 87 S.Ct. 675, 687-688, 17 L.Ed.2d 629 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 19, 86 S.Ct. 1238, 1242, 16 L.Ed.2d 321 (1966); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093 (1940); *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938). Specifically, the Supreme Court has upheld such overbreadth challenges in cases involving the regulation of obscenity. *See, e.g., Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

[4] Were facial challenges not permitted, overbroad statutes would often restrict protected expression, even though they might ultimately be declared unconstitutional. To begin with, first amendment freedoms "are delicate and vulnerable," and the very "threat of sanctions may deter their exercise almost as potently as the actual

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[4] Under Section Three of the statute, enforcement proceedings may be initiated by the "prosecuting attorney for the county where the alleged moral nuisance is located," by the "city attorney for the city where the alleged moral nuisance is located," or by the state attorney general.

application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Unconstitutionally overbroad statutes can chill protected expression by causing "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within [their] purview." *Thornhill v. Alabama*, 310 U.S. at 98, 60 S.Ct. at 742. Only by permitting facial attacks on such statutes can the unfettered exercise of first amendment freedoms be protected.

Second, facial challenges are necessary because the alternative of awaiting the outcome of individual prosecutions in state courts does not adequately protect first amendment freedoms. Aside from the enormously high costs and lengthy delays involved, *see, e.g., Zwickler v. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967); *Dombrowski v. Pfister*, 380 U.S. at 486-87, 490-91, 85 S.Ct. at 1120-21, 1122-23; *Baggett v. Bullitt*, 377 U.S. 360, 378-79, 84 S.Ct. 1316, 1326-27, 12 L.Ed.2d 377 (1964), a person thinking of engaging in protected behavior may be deterred from acting by the risk of conviction, even though his challenge to the law might eventually be upheld. Consequently, the chill on protected activity deters those whose legal challenges are necessary to narrow an overly broad statute. Absent facial challenges to overbreadth, then, "the contours of [a statute] would have to be hammered out case by case — and tested only by those hardy enough to risk criminal prosecution to determine the [statute's] proper scope." *Dombrowski v. Pfister*, 380 U.S. at 487, 85 S.Ct. at 1121.

The Supreme Court has indicated that there may sometimes be strong policy reasons against applying the overbreadth doctrine in a facial review of a statute's constitutionality. *See Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A major exception to this approach, however, is in the area of first amendment rights. *See, e.g., Stoianoff v. Montana*, 695 F.2d 1214, 1218 (9th Cir.1983). In the case of an ordinary facial challenge to the overbreadth of a law, "a court's first task is to determine whether the enactment reaches a substantial amount

of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455, U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982) (footnote omitted). *See also Kolender v. Lawson*, —— U.S. ——, —— n. 8, 103 S.Ct. 1855, 1859 n. 8, 75 L.Ed.2d 903 (1983); *Stoianoff v. Montana*, 695, F.2d at 1218; *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 946 (11th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 132, 74 L.Ed.2d 113 (1982). The Supreme Court's decision in *Broadrick*, however, "implies that a finding of substantial overbreadth is necessary only when the challenged statute regulates conduct and not speech." *Turchick v. United States*, 561 F.2d 719, 722 (8th Cir.1977). In first amendment overbreadth cases, "a challenge to a statute regulating pure speech would succeed on a lesser showing of facial overbreadth." *Id.* at 722 n. 6.

[5] For these reasons, then, we do not hesitate to entertain plaintiffs' first amendment facial challenges to House Bill 626.[5]

ABSTENTION

[6] Defendants' general argument that federal courts should abstain from deciding the constitutionality of House Bill 626 until the Washington state courts first have an opportunity to construe its provisions was rejected by the district court. *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1037. We will reverse the district court on the issue of abstention only when there has been an abuse of discretion. *See, e.g., Midkiff v. Tom*, 702 F.2d 788, 789 n. 1, 799 (9th Cir.1983); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 819 (9th Cir.), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380, 1385 (9th

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[5] In evaluating a facial challenge, we must also consider whether there are any readily apparent constructions capable of saving the statute, in a single state prosecution, from plaintiffs' constitutional challenges. We discuss this requirement later. *See infra*, 725 F.2d at pp. 488, 489.

Cir.1981). We find that the district court correctly held that abstention would be inappropriate.

We begin with the settled proposition that "a federal court must decide the cases properly before it; abstention from the exercise of jurisdiction is the exception to the rule." *Midkiff v. Tom*, 702 F.2d at 789 n. 1. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d at 1385. Indeed, constitutional challenges based on the first amendment right of free expression are the kind of cases that federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when first amendment rights are at stake. *See Spokane Arcades, Inc. v. Brockett*, 631 F.2d at 137. *See also Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Zwicker v. Koota*, 389 U.S. at 252, 88 S.Ct. at 397.

[7] Nonetheless, defendants argue that abstention under the *Pullman* doctrine is appropriate in this case. *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941). Even a cursory analysis of the three *Pullman* factors, however, explains why *Pullman* abstention is rarely, if ever, appropriate in first amendment cases. To abstain under *Pullman*, a federal court must find that all three of the following factors are applicable: first, that the suit touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative for adjudication exists; second, that a definitive ruling on the state issue in question would end the controversy; and third, that the possibly determinative issue of state law is doubtful. *See, e.g., Midkiff v. Tom*, 702 F.2d at 789 n. 1; *Canton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir.1974). *See also Colorado River Water Conservation District v. United States*, 424 U.S. at 814, 96 S.Ct. at 1244; *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir.1982). In first amendment cases, the first of these factors will almost never be present because the constitu-

tional guarantee of free expression is, quite properly, always an area of particular federal concern. *See, e.g., C-Y Development Co. v. City of Redlands,* 703 F.2d 375, 381 (9th Cir.1983) (citations omitted) ("[T]he Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, racial equality, and first amendments rights of expression."); *Jones v. Metzger,* 456 F.2d 854, 856 (6th Cir.1972) ("Even if a viable option were available to [plaintiffs] under state law, it is well-established . . . that when fundamental civil rights are at issue, federal courts should hesitate to abstain."); *Hobbs v. Thompson,* 448 F.2d 456, 463 (5th Cir.1971) ("[I]n a facial attack [on first amendment grounds] the special circumstances which have been held to justify abstention . . . are usually absent.").

Moreover, abstention by federal courts in first amendment cases could often result in the suppression of free speech that is meant to be protected by the Constitution. As the Supreme Court has emphasized, to abstain and thus "force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota,* 389 U.S. at 252, 88 S.Ct. at 397-98. *See also Procunier v. Martinez,* 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974) ("[W]e are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment."); *Garvin v. Rosenau,* 455 F.2d 233, 239 (6th Cir.1972) ("Further delay necessitated by abstention would be inconsistent with the policy of protecting the First Amendment against possible chilling influences.").

[8] Even if this were a case that did not involve first amendment rights, *Pullman* abstention would still be inappropriate. The second and third *Pullman* factors suggest that abstention is only proper when a federal constitutional issue may be avoided or presented differently once a state law issue is resolved or a state statute is construed. *See, e.g., Spokane Arcades, Inc. v. Brockett,*

631 F.2d at 137. In this case, we find that several key provisions of House Bill 626 are not susceptible to such saving constructions. Consequently, *Pullman* abstention would neither eliminate nor materially change the constitutional issues presented here. *See, e.g., Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 481, 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1976); *Spokane Arcades, Inc. v. Brockett,* 631, F.2d at 137. In short, "the naked question, uncomplicated by an unresolved state law, is whether the [statute] on its face is unconstitutional." *Wisconsin v. Constantineau,* 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971). Abstention would not have been appropriate.

[9, 10] We therefore find that the district court did not abuse its discretion in deciding plaintiffs' claims on their merits.[6]

PLAINTIFFS' CONSTITUTIONAL CHALLENGES

I. *The Definition of Obscenity in House Bill 626 Uncon-*

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[6] None of the other traditional grounds for abstention is applicable in this case. Under the *Burford* doctrine, *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), federal courts may decline to exercise jurisdiction when the case involves "an essentially local issue arising out of a complicated state regulatory scheme." *International Bhd. of Electrical Workers, Local Union No. 1245 v. Public Serv. Comm'n,* 614 F.2d 206, 211 (9th Cir.1980). We have traditionally applied the *Burford* doctrine to cases where suits involving the local issue have been concentrated in an individual state court and where the federal issues are inextricably bound up with state issues which state courts may be especially competent to deal with. *International Bhd.,* 614 F.2d at 211. Neither of these circumstances is likely to exist in a case involving a first amendment challenge to a state statute, and neither circumstance applies in this case.

Abstention may also be appropriate in certain instances when a federal suit seeks to enjoin a pending or ongoing state proceeding in which federal claims could be adjudicated competently. *See, e.g., Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Moore v. Sims,* 442 U.S. 415, 423, 425, 99 S.Ct. 2371, 2377, 2378, 60 L.Ed.2d 994 (1979); *L.H. v. Jamieson,* 643 F.2d 1351, 1352 (9th Cir.1981). It is not necessary to decide whether this is the type of case in which *Younger* abstention might otherwise be appropriate because, as the State notes, "[n]o one has been prosecuted [and] no civil actions have been filed" pursuant to House Bill 626. *See supra,* 725 F.2d at 487.

stitutionally Includes Protected First Amendment Expression.

A.

The judicial effort to find an acceptable definition for obscenity constitutes one of the longest and most arduous struggles in the history of American jurisprudence. After employing several different definitions, the Supreme Court finally adopted a three-part test in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Under the *Miller* test, speech is obscene and thus not protected under the first amendment if three guidelines are satisfied:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

413 U.S. at 24, 93 S.Ct. at 2615 (citations omitted).

Despite the continued adherence to the *Miller* test, few would disagree with the view that only a "dim and uncertain line" separates obscenity from constitutionally protected speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963). As Justices Brennan, Stewart and Marshall remarked, "one cannot say with certainty that material is obscene until at least five members of [the Supreme] Court, applying inevitably obscure standards, have pronounced it so." *Jenkins v. Georgia*, 418 U.S. 153, 164-65, 94 S.Ct. 2750, 2757, 41 L.Ed.2d 642 (1974) (Brennan, Stewart and Marshall, JJ., concurring), *quoting Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92, 93 S.Ct. 2628, 2652, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). Yet, on one side of the *Miller* line, speech is entitled to the highest form of protection afforded by our laws and constitution, while, on the other side, speech that is held obscene may be punished as a crime.

[11] Because of the inevitable uncertainty as to where the line will be drawn and the critical importance of not interfering with constitutionally protected speech, courts have insisted that the *Miller* guidelines be followed without deviation. *See, e.g., Hamling v. United States*, 418 U.S. 87, 114, 94 S.Ct. 2887, 2906, 41 L.Ed.2d 590 (1974) ("*Miller* . . . was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments . . . [and establishes] a limit beyond which neither legislative draftsmen nor juries may go. . . ."). [7] When the *Miller* guidelines were adopted, the Supreme Court emphasized that "[s]tate statutes designed to regulate obscenity must be *carefully limited*. As a result, we now *confine the permissible scope* of such regulation to works" that satisfy the three-part test. *Miller*, 413 U.S. at 23-24, 93 S.Ct. at 2614 (emphasis added, citation omitted). To assure that protected speech is not impermissibly regulated, then, even subtle deviations from the *Miller* standards must be carefully examined.

[12] The first requirement under *Miller* is that the average person, applying contemporary community standards, would find "that the work, taken as a whole, appeals to the prurient interest." *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615. Section 1(2)(a) of the Washington anti-obscenity law tracks the *Miller* prurient interest requirement almost exactly. Section 1(8), however, defines "prurient" as "that which incites lasciviousness or lust." Plaintiffs contend that the inclusion of "lust" in the definition of "prurient" impermissibly expands the boundaries of the *Miller* guide-

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[7] *See also Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn.1979) (a court "cannot give constitutional approval to any law expanding the standards for adjudicating obscenity, *vel non*, beyond the dictates of *Miller* and its progeny."); *State v. Princess Cinema of Milwaukee*, 96 Wis.2d 646, 292 N.W.2d 807, 808, 811 (1980) (it was error for a court to "deviate[] from the *Miller v. California* standards."); *D & J Enterprises, Inc. v. Michaelson*, 401 A.2d 440, 442, 446 (R.I.1979) ("[T]he *Miller* Court set out a new framework of revised standards to guide the states in separating what is obscene . . . . from what is not obscene . . . [Because t]he act fails to meet the *Miller* blueprint, [it] must be stricken as constitutionally overbroad.").

lines and renders House Bill 626 unconstitutional. We agree.

The Supreme Court first attempted to define "prurient" in a footnote in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The Court began by noting that "material having a tendency to excite lustful thoughts" was an example of material "appealing to prurient interest." *Roth*, 354 U.S. at 487 n. 20, 487, 77 S.Ct. at 1310 n. 20, 1310. Next the Court referred to the Webster's New International Dictionary (Unabridged, 2d ed., 1949), which defined "prurient" as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ." Ultimately, however, the Court concluded its analysis by stating that there was "no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957)." *Roth*, 354 U.S. at 487 n. 20, 77 S.Ct. at 1310 n. 20. That section of the A.L.I.'s Model Penal Code defined an item as obscene "if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion. . . ."

Both the district court and defendants contend that *Roth's* definition of "prurient interest" included the concept of "lust." *See, e.g., Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1038 ("*Roth* in actuality settled upon a shortened definition [of prurient interest], *i.e.*, 'material having a tendency to incite lustful thoughts.' "). Although there may be some initial appeal to this argument, we note that the discussion in *Roth* actually *concluded* with the A.L.I. Model Penal Code definition — one that defined a "prurient interest" as "shameful or morbid" and that did not include "lust" either expressly or within the meaning of the words used in the definition. *See, e.g., Goldstein v. Allain*, 568 F.Supp. 1377 (N.D. Miss.1983) ("*Roth* and *Miller* attributed to the term 'prurient interest' a specific judicial meaning — that of a shameful and morbid interest in nudity, sex, or excretion.").

While we do not believe the Supreme Court intended in *Roth* to equate "lust" with "prurient interest," we also recognize that the meaning of words changes as a result of contemporary usage. Obscenity jurisprudence — based as it has been on contemporary community standards and changing social mores — is an extremely fluid area of law. *See, e.g., Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1029 n. 7 (5th Cir.1981), *cert. denied,* 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). The connotations that accompanied the word "lust" in 1957 when *Roth* was decided, are not necessarily the same ones that attach to the word today. For example, the most recent edition of Webster's New International Dictionary (Unabridged, 3d ed., 1976) no longer includes the word "lust" in its definition of "prurient." Indeed, the word has acquired such acceptable connotations that, prior to this election in 1976, presidential candidate Jimmy Carter confessed in a popular national publication that he had "looked on a lot of women with lust [and] . . . committed adultery in my heart many times." "Playboy Interview: Jimmy Carter," "*Playboy,* Nov. 1976, at 86. We do not think that President Carter was describing a shameful or morbid interest; rather, he was obviously expressing a healthy, wholesome, human reaction common to millions of well-adjusted persons in our society. Certainly, we think it clear that is how the country understood his remark, and how the term "lust" is generally perceived today.

Court decisions since *Roth* have implicitly recognized the changing meanings of the words used to define obscenity. The *Miller* decision, which supplies the Supreme Court's most recent definition of obscenity, has replaced the definitions offered in *Roth.* In *Miller,* the Supreme Court makes no reference to the term "lust." To the contrary, the *Miller* Court refers *solely* to the definition of obscenity offered in the A.L.I.'s 1962 Official Draft of the Model Penal Code. 413 U.S. 18 n. 2, 93 S.Ct. at 2612 n. 2. The section of the Code cited by the Court defines "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion." A.L.I. Model Penal Code § 251.4(1) "Ob-

scene Defined." (Official Draft 1962). Other courts that have considered the issue have followed the Supreme Court's instructions in *Miller* and defined "prurient interest" as "shameful or morbid" and not as "lustful." *See, e.g., Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d at 1026,[8] *United States v. 35 MM. Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705, 711 (2d Cir.1970), *cert. denied,* 403 U.S. 925, 91 S.Ct. 2241, 29 L.Ed.2d 704 (1971); *Goldstein v. Allain,* 568 F.Supp. 1377 (N.D.Miss., 1983); *Leech v. American Booksellers Association, Inc.,* 582 S.W.2d 738, 749-50 (Tenn. 1979).

We agree with these decisions and reaffirm that, under the first prong of the *Miller* test, a "prurient interest" is "a shameful or morbid interest in nudity, sex or excretion." By including "lust" in its definition of "prurient," the Washington state legislature has clearly exceeded the established — though sometimes blurred — boundaries drawn by the Supreme Court to distinguish protected first amendment expression from that which is obscene.

[13] Indeed, to permit expression that merely excites "lust" to be regulated by the state would destroy the boundaries between protected and unprotected speech. To the contemporary jury, "lust" is unlikely to connote anything more than "sexual desire." *Webster's Third New International Dictionary* (Unabridged, 3d ed., 1976); *see also The Random House Dictionary of the English Lan-*

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[8] In *Red Bluff,* the Fifth Circuit held that "the lack of a definition for the term 'prurient interest' does not render the [Texas obscenity] statute constitutionally deficient." 648 F.2d at 1026. Defendants argue that *Red bluff* is dispositive here. We disagree. *Red Bluff* involved a statute that recited, "with little variation, the familiar three-part *Miller* test" for obscenity. 648 F.2d at 1026. The statute included the term "prurient interest," although no definition was offered. The Fifth Circuit found that a specific provision in Texas law required courts construing the term "to apply any 'technical or particular meaning' the term has acquired from prior judicial review." 648 F.2d at 1026 (citations omitted). Thus, *Red Bluff* involved a statute that adopted the *Miller* test exactly but contained *no definition whatsoever* of "prurient interest;" the proper and constitutional definition was supplied by operation of law. In the case before us, House Bill 626 contains a very explicit definition of "prurient" — one that expressly incorporates an overbroad and unconstitutional definition of that term.

guage (Unabridged, 1979) ("lust" defined as "sexual desire or appetite"). *See, e.g., Goldstein v. Allain,* 568 F.Supp. 1377, at 1385 (N.D.Miss.1983) ("The inclusion of the terms lustful and erotic [in the Mississippi anti-obscenity statute's definition of prurient interest] would permit the application of the statute to arguably protected materials. Such an intrusion into the area of protected speech is impermissible."). Expression that may merely stimulate sexual longing or desire is entitled to the full range of first amendment protections and cannot constitutionally be branded as obscene.[9]

We agree with the Second Circuit's conclusion "that the Supreme Court has never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality. To conclude otherwise would be to suggest that the human body and its functions are in themselves somehow 'dirty' or unspeakably offensive." *United States v. 35 MM. Motion Picture Film Entitled "Language of Love,"* 432 F.2d at 711.[10] Such an argument is degrading, and, like the Second Circuit, we reject it. In fact, if the arousal of good, old-fashioned, healthy lust "is equated with an appeal to 'prurient interest,' it might be necessary to hale into court our leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles," 432 F.2d at 712, as well as

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[9] The dissent's reliance on the Supreme Court's order of dismissal in *Art Theatre Guild, Inc. v. Ewing,* 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975) is misplaced. A review of the papers submitted to the Court by the parties reveals that neither the appellant nor the appellee even mentioned the Ohio statute's inclusion of the term "lust." Similarly, there is no indication in the Ohio Supreme Court's opinion in the underlying case that the "lust" issue was ever raised before that court. *State v. A Motion Picture Film Entitled "Without a Stitch,"* 37 Ohio St.2d 95, 307 N.E.2d 911 (1974).

[10] This Second Circuit decision involved an obscenity challenge to a motion picture called "Language of Love." Even though "[t]o the average person . . . certain scenes in 'Language of Love' may present a temporary erotic appeal, and the effect may be temporary sexual arousal," 432 F.2d at 711-12, the Second Circuit found that the film did not appeal to the prurient interest and thus was not obscene.

mainstream stage, movie and television producers, directors and performers. Only by distinguishing between "the arousal of sexual instincts and the perversion of those instincts to morbidity," 432 F.2d at 712, can we ever hope to safeguard from state intrusion the already "dim and uncertain" boundary surrounding protected first amendment expression.

B.

As in all cases, involving facial constitutional challenges to state statutes that have not yet been enforced or authoritatively interpreted, we must consider possibility of a "readily apparent construction [by a state court] . . . as a vehicle for rehabilitating the statute[] in a single prosecution." *Dombrowski v. Pfister*, 380 U.S. at 491, 85 S.Ct. at 1123. *See also Zwickler v. Koota*, 389 U.S. at 251 n. 14, 88 S.Ct. at 397 n. 14 ("the state statute" must be "obviously susceptible of a limiting construction"); *Harrison v. NAACP*, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959); *Stoianoff v. Montana*, 695 F.2d at 1218. If it were obvious from a reading of the statute that a state court could in a single prosecution properly construe the statute in a manner that would render it constitutional, our decision on plaintiffs' constitutional challenges would be "render[ed] unnecessary," *Zwickler v. Koota*, 389 U.S. at 250, 88 S.Ct. at 397, and we would dismiss plaintiffs' challenges. *Broadrick*, 413 U.S. at 603, 617, 93 S.Ct. at 2911, 2918.

In this case, we find it crystal clear that the term "prurient," as used in House Bill 626, includes "lust." It is not possible, under the statute, to give the term a contrary meaning. The statute expressly incorporates the term "lust" in its definition of "prurient."[11] Consequently, a

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[11] The district court agreed with defendants' argument that § 1(8) of House Bill 626 defines only the word "prurient" and not the term "prurient interest." Consequently, defendants contend that § 1(2) — which incorporates the *Miller* test, including the term "prurient interest" — can be read independently of the definition of "prurient" in § 1(8). *See, e.g., Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1038-39. If this is the case, defendants argue, the term "prurient inter-

state court would either have to ignore the statutory definition completely or rewrite the statute in order to narrow its unconstitutional scope.

Since the state statute is not obviously susceptible to an interpretation that will avoid the federal constitutional issued raised by plaintiffs, it is our duty to decide the constitutional question presented. *See, e.g., Zwickler v. Koota,* 389 U.S. at 250-51, 88 S.Ct. at 396-97. *See also Aptheker v. Sec'y of State,* 378 U.S. 500, 515, 84 S.Ct. 1659, 1668, 12 L.Ed.2d 992 (1964) (statute held invalid because "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting."); *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d at 1029 ("If on its face the statute warned too broadly, deference to the state courts would be inappropriate."); *Turchick v. United States,* 561 F.2d at 724 ("we need not rely on . . . a saving construction because we believe the language of the statute is clear."). *Cf. Kunz v. New York,* 340 U.S. 290, 304, 71 S.Ct. 312, 320, 95 L.Ed. 280 (1951) (Jackson, J., dissenting) ("It may happen that a statute will disclose by its very

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est" can be given its recognized judicial meaning and the word "lust" in § 1(8) can be ignored.

We find this interpretation of House Bill 626 to be completely implausible. To begin with, the word "prurient" is only twice in the statute: in § 1(8), where it is defined, and in § 1(2)(a), where it is part of the phrase "prurient interest." It would have made no sense for the framers of House Bill 626 to define "prurient" and then never to use the word in the statute. Thus, the only reasonable conclusion is that the definition of "prurient" in § 1(8) is intended to refer to the use of that word the only other time it appears in the statute, in § 1(2)(a). This is also the only conclusion that avoids the untenable result of rendering a portion of the statute — the definition of "prurient" in § 1(8) — completely irrelevant and superfluous.

In addition, the introduction to § 1 of House Bill 626 explicitly commands that "[t]he definitions set forth in this section shall apply throughout" the entire statute. It makes little sense to argue, then, that a definition of a word provided in § 1(8) does not apply when the same word is used in § 1(2)(a). In fact, the other definitions offered in § 1(3) & (4) also refer to words used in the statute's definition of obscenity in § 1(2). We thus reject as utterly without merit defendants' alternative reading of House Bill 626.

language that it is impossible of construction in a manner consistent with First Amendment rights.").

C.

[14] Because the definition of obscenity in Washington's anti-obscenity statute unconstitutionally infringes on protected expression, the entire statute must be declared invalid. The application of both civil and criminal penalties under House Bill 626 depends upon a determination that the materials involved are legally obscene. Consequently, an unconstitutionally overbroad definition of obscenity renders House Bill 626 null and void.

II. *The Civil Fine Provisions of House Bill 626 Unconstitutionally Restrict Protected First Amendment Expression.*

In view of the State of Washington's previous attempts to deal with obscenity and the fact that the legislature will undoubtedly try again, we believe it advisable to consider one of the other principal aspects of House Bill 626 challenged in these cases: the statute's civil fine provision. We consider this provision because it contains an obviously unconstitutional feature.[12]

The civil penalty provision of House Bill 626 is set forth in section 4(2). Once it has been determined "that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropri-

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[12] Our discussion of one aspect of the civil fine provision, and our failure to discuss other important issues, should not be read as intimating any view on the remaining constitutional challenges raised by plaintiffs. We do not here consider plaintiffs' other complaints regarding the dual civil-criminal fine system. In particular, we express no opinion on plaintiffs' other first amendment and eighth amendment challenges to the statute's civil and criminal penalty provisions. Nor do we indicate any view on the district court's two-fold decision that (a) the Constitution requires a jury trial in obscenity cases when civil fines are imposed, and (b) the federal courts need not now determine whether persons against whom such fines are sought would be afforded the right to a jury under Washington law. *See Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. at 1042-43.

ate. In imposing the civil penalty, the court shall consider the wilfullness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance." Unlike the general nuisance statute, *Wash. Rev.Code Ann.*, § 7.48.250 (1961, 1983 Supp.), there is no limit in House Bill 626 on the amount of the civil fine that may be assessed.

Plaintiffs challenge the civil penalty provision on a variety of grounds. The one we consider here relates to the requirement that a court must take into account "the profits made by the defendant attributable to the moral nuisance" when setting the amount of the civil fine. The statute defines a "moral nuisance," in three of four instances, as a "place" where obscene materials or behavior may be found.[13] Thus, the civil fine, which is premised in part on profits "attributable to the moral nuisance," may be based on profits from the *sale of protected materials* in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there. For example, the statute would allow a theater owner who sold $1,000,000 worth of admissions to constitutionally protected films and $100,000 worth of admissions to films judged legally obscene[14] to be fined on the basis of admissions to all of the films shown. Moreover, the amount of

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[13] According to Section Two of the statute, [t]he following are declared to be moral nuisances;

(1) *Any and every place* in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) *Any and every place* of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) *Every place* which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

(Emphasis added).

[14] To qualify as a moral nuisance under Section Two, a theater must "publicly exhibit" obscene films "as a regular course of business" or possess such films for this purpose.

profits from the operation of the entire business is one of only two factors that a judge *must* consider when setting a civil fine.

[15] The procedure for determining civil fines set forth in House Bill 626 is, in our view, unconstitutional. We hold that it is impermissible, in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutionally protected material.

We do not question the State of Washington's right to regulate certain nuisances within its boundaries; what we are concerned with is "the consequences for constitutionally protected speech" in the State's efforts. *Marcus v. A Search Warrant of Property*, 367 U.S. 717, 731, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). Consequently, we apply the familiar requirement that statutes punishing expressive conduct "must be carefully drawn . . . to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522, 92 S.Ct. 1103, 1106, 31 L.Ed.2d 408 (1972). The civil fine provision of House Bill 626 does not satisfy this requirement.

Far from being narrowly tailored to the achievement of a permissible state goal, the civil fine provision "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964). By focusing on the place where the obscene materials are sold or exhibited rather than the unprotected materials themselves, the civil fine provision endangers protected speech. Courts that have addressed similar issues have held that abatement of a moral nuisance "must be directed to the particular books or films which have been adjudged obscene following a fair and full adversary hearing rather than against the premises in which the material is sold, exhibited, or displayed." *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 56, 130 Cal.Rptr. 328, 338, 550 P.2d 600, 610, *cert. denied*, 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289 (1976). A contrary

result would allow the government to punish protected first amendment expression simply because obscene speech was also disseminated from the same place.

In fact, the civil fine provision of House Bill 626 is similar in one important respect to the so-called anti-obscenity "padlocking statutes." These padlocking statutes typically provide for the closure of a place of business after a judicial determination that obscene materials have been disseminated from that location. They have consistently been declared unconstitutional because they constitute impermissible prior restraints on free expression. *See, e.g., Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159, 164-66 (5th Cir.1978) (en banc), and cases cited therein, *aff'd,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *People ex rel. Busch v. Projection Room Theater,* 17 Cal.3d at 42, 130 Cal.Rptr. 328, 550 P.2d 600; *General Corp. v. State ex rel. Sweeton,* 294 Ala. 657, 320 So.2d 668 (1975), *cert. denied,* 425 U.S. 904, 96 S.Ct. 1494, 47 L.Ed.2d 753 (1976); *Sanders v. State,* 231 Ga. 608, 203 S.E.2d 153 (1974); *Gulf States Theaters of Louisiana, Inc. v. Richardson,* 287 So.2d 480 (La.1973); *State ex rel. Andrews v. Chateau X, Inc.* 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated on other grounds,* 445 U.S. 947, 100 S.Ct. 1593, 63 L.Ed.2d 782 (1980); *Mitchem v. State ex rel. Schaub,* 250 So.2d 883 (Fla.1971); *New Riviera Arts Theatre v. State ex rel. Davis,* 219 Tenn. 652, 412 S.W.2d 890 (1967); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976). Of course, the familiar presumption against prior restraints constitutes the principal rationale for these decisions. *See, e.g., Near v. Minnesota,* 283 U.S. 697, 711-15, 51 S.Ct. 625, 629-30, 75 L.Ed. 1357 (1931); *Bantam Books, Inc. v. Sullivan,* 372 U.S. at 70-71, 83 S.CT. at 639-640. We also think it crucial, however, that the padlocking statutes have the effect of preventing the dissemination of protected speech simply because obscene speech originated from the same location. In our view, the civil fine provision of House Bill 626 — which prescribes punishment based on the profits from protected materials that were sold or exhibited in the same place as obscene

materials — is no less objectionable. It may be argued that the protected speech is not being punished but that it only serves as a measure of the appropriate punishment. Such an argument is not persuasive. The crucial point is that free speech is far too sensitive a subject matter to serve as the measurement for civil or criminal penalties.

Moreover, it appears that the civil fine provision of House Bill 626 treats businesses disseminating both protected and unprotected speech differently from the way other businesses are treated under other statutes imposing civil fines. Defendants do not point to any other Washington State statutes that base the amounts of fines on the profits from an entire business when only a part of that business is unlawful. Although we have not conducted an independent analysis of the entire body of Washington law, our sampling of various civil fine provisions has revealed no provision similar to that contained in House Bill 626. To the contrary, the statutes we have examined, including Washington's general nuisance statute. *Wash.Rev.Code Ann.*, § 7.48.250 (1961; 1983 Supp.), merely establish the minimum and maximum amounts of civil penalties.

Differential treatment of first amendment activity with respect to the imposition of fines is prohibited by the Constitution. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, —— U.S. ——, 103 S.Ct. 1365, 1375, 75 L.Ed.2d 295 (1983) the Supreme Court struck down a state use tax that provided for differential treatment of the press. As the Court emphasized, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 1372. The Court's reasoning is as applicable to fines as taxes.

The basing of fines on profits from the sale or exhibition of constitutionally protected materials is unnecessary to the achievement of any legitimate state goal. Thus, the presumption of unconstitutionality cannot be rebutted here. *See, e.g., Minneapolis Star & Tribune Co.*, 103 S.Ct.

at 1372 (differential taxation of first amendment businesses is unconstitutional "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."). In support of our conclusion, we note that in the criminal penalty provision of House Bill 626, the Washington legislature authorized monetary sanctions based *solely* on profits from the sale of constitutionally unprotected materials. The criminal penalty provision requires the court to consider "the profits made by the defendant attributable to the felony," with the felony defined as the promotion of pornography. It is therefore evident that in enacting the civil fine provision, the State of Washington could have achieved its legislative goals by more carefully tailored means that would be less restrictive of free expression. *See, e.g., Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

We do not see any readily apparent construction that could save the civil fine provision. *See supra,* 725 F.2d at 494. As with the statute's definition of "prurient," state courts would have to ignore or rewrite the explicit language of the provision in order to salvage House Bill 626. Consequently, we find that the civil fines section of the Washington anti-obscenity law is unconstitutional.

CONCLUSION

The Washington state anti-obscenity statute adopts an unconstitutionally broad definition of obscenity. We must therefore hold the statute unconstitutional. We also hold that the statute's civil fines provision impermissibly restricts protected speech.

REVERSED.

APPENDIX

House Bill 626 provides, in relevant part:

Section 1. The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of

the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of;

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion

thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

Section 2. The following are declared to be moral issues.

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

Section 3. Any of the following parties may bring a civil action in the superior court of any county where a moral nuisance is alleged to have been maintained:

(1) The prosecuting attorney for the county where the alleged moral nuisance is located;

(2) The city attorney for the city where the alleged moral nuisance is located; or

(3) The attorney general.

The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: PROVIDED, That the standard of

proof on the issue of obscenity shall be clear, cogent, and convincing evidence.

Section 4. (1) No person shall with knowledge maintain a moral nuisance.

(2) Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

Section 5. All civil penalties assessed under section 4 of this act shall be paid into the general treasury of the governmental unit commencing the civil action.

Section 6. Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision.

Section 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 7 RCW.

Section 8. There is added to chapter 9.68 RCW a new section to read as follows:

A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment prescribed for that class of felony, except that upon conviction of promoting pornography the court shall impose a fine of not less than five thousand dollars per count nor more than fifty thousand dollars per count. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

Section 9. If any provision of this act or its application to any person or circumstance is held invalid, the re-

mainder of the act or the application of the provision to other persons or circumstances is not affected.

Section 10. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

WALLACE, Circuit Judge, dissenting:

Rejecting prudential approaches that would allow us to await application of this statute to a concrete factual situation, the majority finds House Bill 626 unconstitutionally overbroad on its face because its drafters, following the Supreme Court's language in *Roth v. United States*, 354 U.S. 476, 486, 487 n. 20, 77 S.Ct. 1304, 1310 n. 20, 1 L.Ed.2d 1498 (1957) (*Roth*), used the word "lust" to help define prurient interest. The majority concludes that "[t]he application of both civil and criminal penalties under House Bill 626 depends on a determination that the materials involved are legally obscene. Consequently, an unconstitutionally overbroad definition of obscenity renders House Bill 626 null and void." Despite having done all it may do as a court, however, the majority goes on to assert that "because the legislature will undoubtedly try again, we believe it advisable to discuss . . . the statute's civil fine provision . . . . because it contains an obviously unconstitutional feature."

What follows that statement is merely advisory. Were it a holding, I would concur: the civil fine provision is overbroad and incapable of a saving construction. Even the majority's prior restraint argument would have force on this issue. *See, e.g.*, Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 412 (1983); *see generally Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). But neither this advice to the state legislature, nor the discussion of it, amounts to an alternative holding. The actual holding of the majority strikes down the whole House Bill 626. The majority's dicta would not reach a similar conclusion; instead, it would strike down only a portion of the statutory scheme, leaving the rest intact. In that sense it is not an alternative way of

reaching a result, but an answer to a different, and lesser, question. An outcome-determinative test shows the majority's conclusion about the unconstitutionality of the civil fines cannot be a true alternative holding. Had the majority correctly decided that the mere use of "lust" is not facially overbroad, the remaining "alternative holding" would not allow the appeal to come out the same way on the validity of the statute as a whole. *See* Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings,* 50 U.Chi.L.Rev. 701, 703 (1983). Because the civil fine discussion is dictum, I do not vote upon it. I do dissent, however, from the part of the majority opinion that is a holding.

The current limits on obscenity legislation, state or federal, appear generally in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (*Miller*). That case did not reject all that had gone before, or limit scripturally all that would come after. *See, e.g., id.* at 24 n. 6, 93 S.Ct. at 2615 n. 6. In explaining the term "obscene material," *Miller* affirmed that the words "have a specific judicial meaning which derives from the *Roth* case, *i.e.,* obscene material 'which deals with sex.' *Roth, supra,* [354 U.S.] at 487 [77 S.Ct. at 1310]. See also ALI Model Penal Code § 251.4(1) 'Obscene Defined.' (Official Draft 1962)." *Miller,* 413 U.S. at 18 n. 2, 93 S.Ct. at 2612 n. 2. The Court's opinion, *id.* at 24, 93 S.Ct. at 2614, also looked back to *Roth* for help in defining the permissible scope for state regulation of obscene material: "whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra* [408 U.S. 229], at 230 [92 S.Ct. 2245, at 2246, 33 L.Ed.2d 312], quoting *Roth v. United States, supra,* [354 U.S.], at 489 [77 S.Ct. at 1311]."

In reaffirming that the first amendment does not protect obscene material, *Miller* clearly indicates that *Roth* provides the chief source for understanding "prurient interest." Only in *Roth,* and in no other opinion, did the Court explain the term:

> Obscene material is material which deals with sex in a manner appealing to prurient interest.[20]

354 U.S. at 487 & n. 20, 77 S.Ct. at 1310 & n. 20 (emphasis added).

It is thus clear in *Roth*, unchanged by *Miller*, that "lustful thoughts" can be a part of the "prurient interest" definition. The majority would eliminate that part of *Roth* in order to arrive at its conclusion that the State of Washington may not constitutionally include "lust" as even a part of its definition.

First, the majority argues that the direct citation to "lustful thoughts" means nothing because the *Roth* footnote ends by citing the Model Penal Code. But why? Would not the reverse of this argument make as much sense: because the Court begins by citing "lustful thoughts," the rest of the footnote means nothing?

The better interpretation is to read the footnote as a whole. Indeed, as the Court's reference in the footnote to "no significant difference in meaning" hints, the footnote catalogues different ways to describe the same concept. The reference to lust describes prurient interest as much as does the reference to the Model Penal Code. *See, e.g.*,

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[20] *I.e., material having a tendency to excite lustful thoughts.* Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:

". . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."

Pruriency is defined, in pertinent part, as follows:

". . . Quality of being prurient; lascivious desire or thought. . . ." See also *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 242, 35 S.Ct. 387, 390, 59 L.Ed. 552, where this Court said as to motion pictures: ". . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to.* . . ." (Emphasis added.)

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz:*

". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*

Feinberg, *Pornography and the Criminal Law*, 40 U.Pitt.L.Rev. 567, 585 (1979) (interpreting obscenity in *Roth* with reference to the "appeal to prurient interest" clause: obscenity means "whatever is produced for the sole purpose of arousing lustful thoughts . . . .").

No doubt the Supreme Court has often addressed the Model Penal Code's definition of prurient interest because states have often enacted it. *See, e.g., Ward v. Illinois*, 431 U.S. 767, 771, 97 S.Ct. 2085, 2088, 52 L.Ed.2d 738 (1977) (Ill.Rev.Stat. c. 38, § 11-20(b)); *S.S. & W., Inc. v. Kansas City*, 421 U.S. 925, 95 S.Ct. 1650, 44 L.Ed.2d 83 (1975) (Kansas City Ord. § 26.141) (Brennan, J., dissenting form dismissal of the appeal for want of a substantial federal question); *Jenkins v. Georgia*, 418 U.S. 153, 154-55, 94 S.Ct. 2750, 2752, 41 L.Ed.2d 642 (1974) (Ga.Code Ann. § 26-2101); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 51 n. 1, 93 S.Ct. 2628, 2632 n. 1, 37 L.Ed.2d 446 (1973) (Ga.Code Ann. § 26-2101); *Miller*, 413 U.S. at 16 n. 1, 93 S.Ct. at 2611 n. 1 (Cal.Penal Code § 311.2(a)). That does not mean the Court has abandoned *Miller's* adoption of the *Roth* definition. The Supreme Court has never held that the Model Penal Code provides the only acceptable definition. States may choose other ways to define appeals to the prurient interest. *Cf. Smith v. United States*, 431 U.S. 291, 310, 97 S.Ct. 1756, 1769, 52 L.Ed.2d 324 (1977) (Powell, J., concurring) (states have power to design their obscenity statutes as they see fit; "Within the boundaries staked out by *Miller*, the states retain broad latitude . . . ."). Indeed, that is what has occurred.

In accepting this latitude to define, some states have not followed the Model Penal Code but have, as identified in *Miller* itself, 413 U.S. at 24 & n. 6, 93 S.Ct. at 2615 & n. 6, listed particular depictions of physical conduct. *See, e.g., id.* (1971 Ore.Laws, c. 743, art. 29, §§ 255-262; 1972 Hawaii Sess. Laws, Act 9, c. 12, pt. II, at 126-29); *see also Young v. American Mini Theatres*, 427 U.S. 50, 53 & n. 4, 96 S.Ct. 2440, 2444 & n. 4, 49 L.Ed.2d 310 (1976) (Detroit zoning ordinance). Other states have chosen, by using language like that in the *Roth* footnote, a third way to define appeal

to the prurient interest. The Ohio legislature devised the following alternative definitions:

> "(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:
>
> "(1) Its dominant appeal is to *prurient interest;*
>
> "(2) Its dominant tendency is to arouse *lust* by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
>
> "(3) Its dominant tendency is to arose *lust* by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> "(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to *prurient interest,* when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose." Ohio Rev. Code Ann. § 2905.34 (Supp.1972), now Ohio Rev.Code Ann. § 2907.01 (1975).

See Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 923-24, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975) (Brennan, J., dissenting from dismissal for want of a substantial federal question) (emphasis added). The state courts enjoined the showing of a film under this statute. The Supreme Court dismissed an appeal from the injunction. *Id.* at 923, 95 S.Ct. at 1649. Although the Court clearly had the "ultimate power . . . to conduct an independent review of [any] constitutional claims," *Miller,* 413 U.S. at 25, 93 S.Ct. at 2615, it saw no substantial federal question raised despite the use of the word "lust." *See also State ex rel. Keating v. "Vixen",* 35 Ohio St.2d 215, 301 N.E.2d 880 (1973) (without construing the Ohio statutes in any way, holding they comport with *Miller*).

Nebraska's definition of obscenity, Neb. Rev.Stat. § 28-926.07 (1964), incorporates language from *Roth* and the Model Penal Code as alternatives. The statute asks whether the dominant theme of material "appeals to the prurient interest, which is to excite *lustful thoughts*, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor." *Id.* (emphasis added). Ordered to reconsider a conviction under section 28-926.07 in light of *Miller*, the Nebraska Supreme Court found "the Nebraska statutes fully comply with the requirements of *Miller v. California* . . . . We have not given them a new or different construction [to reach that conclusion] . . . ." *State v. Little Art Corp.*, 191 Neb. 448, 215 N.W.2d 853, 856, *on remand from* 414 U.S. 1151, 94 S.Ct. 907, 39 L.Ed.2d 105 (1974). *See* Note, *Community Standards, Class Actions, and Obscenity Under* Miller v. California, 88 Harv.L.Rev. 1838, 1847 n. 51 (1975). Notably, the court considered "lust" and "lasciviousness" equivalent: "The word prurient in its application to obscenity means 'tending to excite lasciviousness' and lasciviousness means the presence or arousal of sexual desire. Similarly applied to obscenity the word lustful refers to sexual desire." *Id.*

In Georgia, although the statute tracks the Model Penal Code definition of obscenity, the courts have recently defined material appealing to the prurient interest as "material which has a tendency to excite *lustful* thoughts." *Spry v. State*, 156 Ga. App. 74, 274 S.E.2d 2, 5 (Ga.App.1980) (emphasis added). A jury instruction along those lines "simply gave the jury a better understanding of the meaning of prurient appeal. See *Roth v. United States*, 354 U.S. 476, 477(4), 487 [77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498] . . . ." *Spry v. State*, 274 S.E.2d at 5.

It would appear, therefore, that neither the Supreme Court nor state courts have abandoned the use of the term "lust" in proscribing obscenity under the first amendment. The Model Penal Code definition, although helpful, has not been decreed the only acceptable method of defining prurient interest.

The majority's other argument is that the meanings of words change, and "lust" no longer aids anyone in defining prurient interest. The scope of obscenity may indeed differ from place to place, time to time, and culture to culture. *See, e.g.*, Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U.Pa.L.Rev. 45, 53 & n. 52 (1974), *citing* G. Gorer, *The Danger of Equality* 218 (1966), and La Barre, *Obscenity, An Anthropological Appraisal*, 20 Law and Contemp.Prob. 533, 541-42 (1955), (certain southsea island cultures find eating in public obscene). In our obscenity jurisprudence, this concern for changing definitions is met head-on by the criterion of "contemporary community standards," *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615; *Roth*, 354 U.S. at 489-90, 77 S.Ct. at 1311-12. *See McKinney v. Alabama*, 424 U.S. 669, 689-90, 96 S.Ct. 1189, 1200, 47 L.Ed.2d 1189 (1976) (Brennan, J., concurring in the result) ("community standards are inherently in a state of flux . . . ."). *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973) ("Words inevitably contain germs of uncertainty . . . ."). The majority, however, finds the Supreme Court's explicit provision for ascertaining change inadequate. Discarding the term "lust" on purely "legal" grounds of changed societal definition usurps the purpose of the "contemporary community standards" test.

The majority also forgets that any purely legal definitions in this area are less dependent on particular editions of dictionaries, or on an interview in *Playboy* magazine,[1] than on the Supreme Court. *See, e.g., Miller*, 413 U.S. at

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[1]It seems strange that the majority's argument for a different sociological view of lust depends so heavily on President Carter's personal views. Furthermore, the majority has misinterpreted those views. President Carter characterized lust as a sin requiring divine forgiveness, not as something "acceptable" in our community. *See* Playboy Interview: Jimmy Carter, *Playboy*, Nov. 1976 at 86:

"I try not to commit a deliberate sin. I recognize that I'm going to do it anyhow, because I'm human and I'm tempted. . . . .

I've looked on a lot of women with lust. I've committed adultery in my heart many times. This is something that God recognizes I will do—and I have done it—and God forgives me for it."

18 n. 2, 93 S.Ct. at 2612 n. 2 (words "obscene material" have a specific judicial meaning derived from *Roth*). The Supreme Court has not adopted the definitional change as embraced by the majority. The Court has used "lust" to help define "prurient interest." *Roth*, 354 U.S. at 487 n. 20, 77 S.Ct. at 1310 n. 20. The Court has reconfirmed the vitality of this use by citation to *Roth*. *See Miller*, 413 U.S. at 18 n. 2, 93 S.Ct. at 2612 n. 2. *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n. 10, 95 S.Ct. 2268, 2275 n. 10, 45 L.Ed.2d 125 (1975) ("[T]o be obscene, 'such expression must be, in some significant way, erotic.' "), *citing Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284 (1971), which, in turn, cites solely *Roth*. The Supreme Court has not subsequently forbidden the use of "lust" to help define "prurient interest." *See Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82. State courts have upheld the use of "lust" since *Miller* to help define prurient interest. *E.g., State v. Little Art Corp.*, 191 Neb. 448, 215 N.W.2d 853. Therefore, I conclude that the majority is wrong in holding as a matter of law that alleged, but unproven, changes in society's definition of "lust" authorize this court to erase the word from a constitutionally permissible definition. If there has been a change in the community view, it will be expressed in the first prong of the *Miller* test in assessing contemporary community standards.

Dealing with an obscenity definition is not easy work. Often reasonable minds will differ. Indeed, had I been the drafter of the Washington statute, I would have used a different definition. But the question before us is whether, as a matter of law, use of the word "lust" as part of the definition of prurient interest violates the first amendment. I conclude that the majority was wrong in reading "lust" out of the *Roth* definition as affirmed by *Miller* and that the majority was wrong in holding, as a matter of law, that the meaning of "lust" has changed so that it may not be a part of the *Roth-Miller* definition of prurient interest.

At worst, Washington's use of "lust" taken from *Roth* stands subject to construction in light of *Miller*, which

cited that part of *Roth* sixteen years later. A "limiting" construction is so obvious that, for prudential reasons, we should at least refuse to decide the plaintiffs' constitutional challenges on the basis of Washington's mere use of the word "lust" until a case arises applying the statute. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. at 613, 93 S.Ct. at 2916; *see also* Monaghan, *Overbreadth,* 1981 S.Ct.Rev. 1, 35 (in a declaratory judgment action, the litigant in substance asks "whether the courts will, as a matter of statutory construction, refuse to narrow the statute to constitutional boundaries . . . ."). *Cf. Dombrowski v. Pfister,* 380 U.S. 479, 491-92, 85 S.Ct. 1116, 1123-24, 14 L.Ed.2d 22 (1965) (no readily apparent construction could repair the vagueness of the state law in question, so, in the face of threatened prosecutions, plaintiffs received "appropriate equitable relief without awaiting declaratory judgements in the state courts").

As another court recently observed, "[w]e must not make it impossible to draft legislation by finding facial overbreadth and ambiguity in all words." *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1034 (5th Cir.1981), *cert. denied,* 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). The majority, by finding facial overbreadth in the word "lust," forbids Washington to draft legislation based on Supreme Court precedent. The majority, I conclude, is wrong.

SPOKANE ARCADES, INC.,
a Washington corporation, Plaintiff,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only; Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only; and James Sloane, Spokane City Attorney, in his representative capacity only, Defendants.

J-R DISTRIBUTORS, INC., Plaintiff,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney, Spokane County, State of Washington; James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington; Jeffery C. Sullivan, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; and Fred Andrews, in his official capacity as City Attorney for the City of Yakima, Washington, Defendants.

AZURE ENTERTAINMENT CORPORATION
OF WASHINGTON, Plaintiff,

v.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; Donald C. Brockett, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and James Sloane, in his official capacity as City Attorney for the City of Spokane, Washington, Defendants.

PLAYTIME THEATRES, INC., a Washington
corporation, Plaintiff,

v.

The Honorable KENNETH EIKENBERRY, as Attorney Gen-

eral of the State of Washington, in his representative capacity only; Donald C. Brockett, Prosecuting Attorney of Spokane County, in his representative capacity only; and James Sloane, Spokane City Attorney, in his representative capacity only and Norm Maleng, Prosecuting Attorney of King County in his representative capacity only, Defendants.

JACK BURNS, in his representative capacity as Executor of the Estate of Selom F. Burns, Plaintiff,

v.

The Honorable KENNETH EIKENBERRY as Attorney General of the State of Washington, in his representative capacity only, Defendant.

The AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; Madrona Publishers, Inc.; Superior Publishing Company; Washington Library Association; Pacific Northwest Booksellers Association; Motion Picture Exhibitors of Washington, Alaska, and Northern Idaho; Washington State Council of Teachers of English; Washington Library Media Association; and the Community College Librarian and Media Specialists' Association of Washington, Plaintiffs,

v.

The Honorable KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, Defendant.

KUKIO BAY PROPERTIES, INC., a Washington corporation, Plaintiff,

v.

Norm MALENG, Prosecuting Attorney of King County, in his representative capacity only, Defendant.

Nos. C-82-223 RJM, C-82-230 RJM, C-82-231 RJM, C-82-239 RJM, C-82-240 RJM, C-82-283 RJM and C-82-354 RJM.

United States District Court, E.D. Washington.

July 2, 1982.

Consolidated cases were brought questioning constitutionality of Washington statute regulating pornography and moral nuisances. The District Court, Robert J. McNichols, Chief Judge, held that: (1) Washington statute complied with minimum requirements of *Miller v. California*; (2) statute did not violate title object clause of State Constitution; and (3) whether inclusion of emergency clause violated prescriptions of Washington Constitution was matter best left to ultimate resolution by state judiciary.

Ordered accordingly.

1. Federal Courts — 46

Where claim is predicated upon alleged abridgement of First Amendment rights, federal court should abstain only in face of special circumstances. U.S.C.A. Const. Amend. 1.

2. Constitutional Law — 48(1)

Statutes, when tested for constitutionality, must be construed in common-sense rather than hypertechnical fashion.

3. Constitutional Law — 90.1(8)

Society has right to regulate, or to proscribe completely, dissemination of sexually oriented material found repugnant to prevailing moral standards.

4. Constitutional Law — 90.1(8)

Sexually oriented matter, in order to fall outside ambit of protected speech or activity, must fail a tripartite test; basic guidelines for trier of fact must be whether average person, applying contemporary community standards, would find that work, taken as a whole, appeals to prurient interest, whether work depicts or describes, in patently offensive way, sexual conduct specifically defined by applicable state law, and whether work, taken as a whole, lacks serious literary, artistic, political, or scientific value. U.S.C.A. Const.Amend. 1.

5. Obscenity — 2.5

Washington statute regulating pornography and moral nuisances complies with minimum requirements of *Miller v. California* since there could be little doubt that jurors could properly characterize material in accord with first prong of *Miller*, section describing those obscene representations or depictions would satisfy second *Miller* prong, and use of phrase "in the context in which it is used" serves a limiting function and enhances specificity with which a trial court could address existence of literary, artistic, political or scientific value. U.S.C.A.Const.Amend. 1.

6. Obscenity — 2

Obscenity stands outside umbrella of Constitution.

7. Obscenity — 7

As unprotected activity, lawfully punishable by sanctions, promotion of obscenity stands in no different posture than would any other activity inimical to public interest and subject to criminal penalties.

8. Obscenity — 2.5

Washington statute regulating pornography and moral nuisances met minimal constitutional requirements with respect to prior restraint in light of its statutory scheme defining scienter. Wash.Laws 1982, ch. 184, § 1 et seq.; U.S.C.A.Const.Amend.1.

9. Obscenity — 18

There is no per se constitution constraint against imposition of civil sanctions for obscenity-related offenses.

10. Obscenity — 1.2

Civil action should require same element of scienter as is mandated in criminal prosecution with respect to obscenity actions.

11. Obscenity — 18

Under Washington statute regulating pornography and moral nuisances, trial court may not act with unlimited discretion and without predefined and objectively ar-

ticulated standard; rather, court must ascertain nature and extent of ill-gotten gains, after an adjudication of illegality, and impose penalties accordingly and underlying purpose of fines bears rational relationship to activity sought to be proscribed and is entirely within legitimate parameters of state's police powers. Wash. Laws 1982, ch. 184, § 1 et seq.

12. Criminal Law — 1206(2)

Where punishment is completely without rational nexus to legitimate social goals, principle of proportionality may be applicable.

13. Obscenity — 2.5

In view of Washington's compelling state interest in controlling commercial obscenity, there was rational connection between criminal penalties contemplated by Washington statute regulating pornography and moral nuisances and governmental objective of regulating pornography. Wash. Laws 1982, ch. 184 § 1 et seq.

14. Statutes — 109, 109.1

Purpose of title of statute is to put interested persons on notice of subject matter in manner sufficient to prompt inquiry into body of act if one should wish to do so; and where title is broad and comprehensive, it will be liberally construed. West's RCWA Const.Art. 2, § 19.

15. Statutes — 107(3)

Pornography and moral nuisances are not so discordant and inimical to one another as to be without rational unity; thus, Washington statute regulating pornography and moral nuisances did not violate State Constitution's title object clause. West's RCWA Const.Art. 2, § 19; Wash.Laws 1982, ch. 184, § 1 et seq.

16. Federal Courts — 383

Federal courts may rely upon intermediate appellate decisions where it is reasonable to assume that such opinions present current status of state law.

17. Constitutional Law — 50

Where conflict arises between source of political au-

thority, i.e., the people, and body to which such powers have been delegated, i.e., the legislature, there is no rule of reason which dictates that derivative powers be accorded weight over primary source of such authority.

18. Federal Courts — 43

With respect to question of whether inclusion of emergency clause in Washington statute regulating pornography and moral nuisances violated prescriptions of Washington Constitution, that was a matter best left to ultimate resolution by state judiciary. Wash.Laws 1982, ch. 184, § 1 et seq.; West's RCWA Const.Art. 2, § 1(b) as amend. 7.

Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., Robert Eugene Smith, Encino, Cal., for plaintiff in No. C-82-223.

John H. Weston, David M. Brown, Brown, Weston & Sarno, Beverly Hills, Cal., Carl Maxcy, The Maxy Law Firm, Spokane, Wash., for plaintiffs in Nos. C-82-230 and C 82-231.

Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., for plaintiff in No. C-82-239.

Charles Stixrud, Seattle, Wash., Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., for plaintiff in No. C-82-240.

James Lowe, Bogle & Gates, Seattle, Wash., for plaintiff in No. C-82-283.

Jack R. Burns, Hubbard, Burns & Meyer, Kirkland, Wash., for plaintiff in No. C-82-354; Robert Eugene Smith, Encino, Cal., Arthur Schwartz, Denver, Colo., of counsel.

Jeffrey C. Sullivan, Pros. Atty., Yakima, Wash. for defendant Sullivan.

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Atty. Gen., Spokane, Wash., for defendant Eikenberry.

Donald C. Brockett, Spokane County Pros. Atty., Spokane, Wash., for defendant Brockett.

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Charles S. Hamilton, III, Deputy Pros. Atty. Civ. Div., Seattle, Wash., for defendant Maleng.

MEMORANDUM DECISION

ROBERT J. McNICHOLS, Chief Judge.

The issue in these consolidated cases[1] is the constitutionality of House Bill 626, an Act passed by the Washington Legislature regulating pornography and moral nuisances.[2] Plaintiffs have asked for extraordinary relief declaring the statute unconstitutional and enjoining its enforcement. Specifically, it is argued that provisions of the Act are overbroad and vague, and that the statute is more restrictive than the standard mandated by the United States Supreme Court, that it has a chilling effect on First Amendment freedoms, imposes cruel and unusual punishment, and is framed in violation of Washington State's constitution.

In passing upon the constitutionality of this Act, I have broken down discussion into three broad generic topics: (1) the substantive provisions, particularly in terms of the definitions employed; (2) the procedural aspects with emphasis on due process requirements; and (3) state constitutional questions.

[1] Jurisdiction is founded on the Federal Question Statute, 28 U.S.C. § 1331. It should be noted at the outset that defendants' arguments in favor of general abstention

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[1]Objection has been raised concerning the standing of several plaintiffs to participate in this action. I share in the reservation that some of these parties might more properly be cast in the role of amicus than as litigants. In view of the disposition of this matter, however, the question is largely academic.

[2]*Wash.Sess.Laws*, ch. 184, 47th Legis. (effective April 1, 1982).

are rejected. Where a claim is predicated upon alleged abridgement of First Amendment rights, a federal court should abstain only in the face of special circumstances. *Zwickler v. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967). The extenuating factors referenced in that decision are not present here.

[2] Second, I adhere to the well settled proposition that statutes, when tested for constitutionality, must be construed in a common sense rather than hypertechnical fashion. *See United States Civil Service Comm. v. Natl. Ass'n of Letter Carriers*, 413 U.S. 548, 579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973); *United States v. Vuitch*, 402 U.S. 62, 72, 91 S.Ct. 1294, 1299, 28 L.Ed.2d 601 (1971).

I. SUBSTANTIVE PROVISIONS

[3, 4] Since *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed2d 419 (1973), there can be no question but that society has the right to regulate, or to proscribe completely, the dissemination of sexually oriented material found repugnant to prevailing moral standards. *Miller* mandates that such matter, in order to fall outside the ambit of protected speech or activity, must fail a tripartite test:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S.Ct. at 2614 (citations omitted).

The parties are in solid agreement that this test is the well established law of the land and is unquestionably controlling in the instant case. Somewhat less mutuality of thought is apparent with regard to application of the individual prongs to HB 626, with the plaintiffs arguing that the Act deviates significantly from settled definitions ac-

corded a number of instrumental terms, and is thereby impermissibly both overbroad and vague.

With *Miller* as the analytical cornerstone, the task before the Court is to weigh plaintiffs' objections in light of the evolving body of case law springing forth since that seminal decision.

Plaintiffs attack the statute's definitions on a number of fronts. The textual portion of HB 626 which restates the *Miller* test[3] does exhibit some deviation from the language employed by the Supreme Court. Section 1(2), for example, reads: " 'Lewd matter' is synonymous with 'obscene matter' . . . " Section 1(3) is worded: " 'Lewdness' shall have and include all those meanings which are assigned to it under the common law." Reading these sections together, it may appear at first blush that the statute purports to impose a common law definition of obscenity in derogation of well-settled precedent. A careful reading of the bill, however, reveals that neither the terms "lewd" nor "lewdness" are employed in any substantive manner. In no way do they alter or impair the test for obscenity. Rather, these appellations are merely descriptive in nature. Indeed, under the statute's own terms, one must mentally substitute "obscene" wherever the term "lewd" is used.

Section 1(2)(a) is a virtually verbatim adoption of the first prong of the *Miller* test. Section 1(8), however, arguably impacts the integrity of that prong by defining "pruri-

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[3](2) "Lewd matter" is synonymous with "obscene matter" and means any matter: (a) Which the average person applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicity depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including not [sic] not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

ent" as "that which incites lasciviousness or lust." Plaintiffs contend that "prurient" has a more circumscribed meaning, and point to case law noting in dicta that prurient interest entails "a shameful or morbid interest in nudity, sex, or excretion." *Roth v. United States*, 354 U.S. 476, 487 n.20, 77 S.Ct. 1304, 1310 n.20, 1 L.Ed.2d 1498 (1957). At the same time, however, *Roth* in actuality settled upon a shortened definition, *i.e.*, "material having a tendency to incite lustful thoughts." *Id.*[4]

At the risk of becoming enmeshed in semantical nitpicking, it should be noted that section 1(8) does not define what is obscene. That is a function of the conjunctive tripartite test. Rather, the section defines what is pornographic.

> The material we are discussing in this case is more accurately defined as "pornography" or pornographic material." "Pornography" derives from the Greek *(porne*, harlot, and *graphos*, writing). The word now means "... a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement."

Miller, supra, 413 U.S. at 19 n.2, 93 S.Ct. at 2612 n.2.

[5] Contrary to the layman's conception, "pornography" and "obscenity," when utilized as legal words of art, are not interchangeable in application, the former being a subspecies of the latter. *Id. See also Spokane Arcades v. Ray*, 449 F.Supp. 1145, 1151-52 n.6 (E.D.Wash.1978), *aff'd sub nom. Spokane Arcades v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd* —— U.S. ——, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981). That is to say, pornography is descriptive of the sexual character of erotic material and is not necessarily obscene. Before that latter label will attach, the material in question must also fail the second and third prongs

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[4]Whatever may be the value of dissenting opinions, I note with some interest that Justice Douglas placed the same construction on the decision's ultimate definition. In order for material to be pruient under the majority opinion, "[a]ll it need do is to incite a lascivious thought or arouse a lustful desire." *Roth, supra*, 354 U.S. at 514, 77 S.Ct. at 1324 (Douglas, J., dissenting).

of the *Miller* test. Thus, I have no difficulty whatever with the fact that §§ 1(2)(a) and 1(8) when read together define only pornography and not obscenity. The rationale of *Miller* and progeny is still served and there can be little doubt but that jurors will have sufficient command of the common meanings ascribed to lust and lasciviousness to properly characterize material in accord with the first prong of *Miller*.

Plaintiffs also call into question section 1(2)(b) which describes those representations or depictions which, when presented in a patently offensive manner, will satisfy the second *Miller* prong. Objection is raised with respect to both §§ 1(2)(b)(ii) and (iii). The former proscribes depictions of "[m]asturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area." It is argued that this list is more expansive than the examples suggested by *Miller*. *See* 413 U.S. at 25, 93 S.Ct. at 2615. So it is, but I find the additions to be permissible under the doctrine of *ejusdem generis*. *Cf. Ward v. Illinois*, 431 U.S. 767, 773-75, 97 S.Ct. 2085, 2089-90, 52 L.Ed.2d 738 (1977); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 52, 93 S.Ct.2628, 2632, 37 L.Ed.2d 446 (1973). The *Miller* Court very pointedly noted that the list promulgated in that decision was by no means exhaustive.

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a *few plain examples of* what a state statute could define for regulation ....

Id. at 25, 93 S. Ct. at 2615 (emphasis added); *see also Hamling v. United States*, 418 U.S. 87, 114, 94 S.Ct. 2887, 2906, 41 L.Ed.2d 590 (1974).

The additional proscriptions of HB 626, *i.e.*, bestiality, fellatio, and cunnilingus, are well within the spirit of *Miller*, and indeed, as held by one recent persuasive decision, such increase in specificity actually reduces the basis for claims of vagueness. *Red Bluff Drive-In v. Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981), *cert. denied sub nom. The-*

atres West v. Holmes, —— U.S. ——, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982).

Plaintiffs also find objectionable on two counts § 1(2)(b)(iii) which proscribes "[v]iolent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture . . . ." It is contended first that the language "including but not limited to" runs afoul of the specificity mandated by *Miller.* 413 U.S. at 24, 93 S.Ct. at 2614. I am not persuaded. The phrase at issue is modified by the language "violent or destructive sexual acts," and I am confident that courts called upon to construe any future application of this section will be guided by that limiting phraseology. So viewed, the following quote from *Miller* becomes instructive:

> If a state law that regulates obscene material is thus limited, as written or *construed,* the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

413 U.S. at 25, 93 S.Ct. at 2615 (emphasis added).

With the same confidence in the integrity and wisdom of the appellate process as is evidenced by the foregoing passage, I cannot find the phrase complained of either facially overbroad or vague.

The second objection concerns reference to animals. The uninitiated might express some wonderment as to what possible nexus there might be between violent or destructive behavior directed toward animals and sexual materials. Such curiosity is quickly sated with a reading of *Miller v. Reddin,* 293 F.Supp. 216 (C.D.Cal.1968), *rev'd on procedural grounds,* 422 F.2d 1264 (9th Cir. 1970). *See also Red Bluff Drive-In, supra,* 648 F.2d at 1026. Plaintiffs' announced fear that depictions of hunting might fall within the proscriptions of HB 626 is totally specious.

Finally, the third prong of *Miller,* as embodied in § 1(2)(c), is also attacked by plaintiffs as an impermissible expansion of settled precedent. This section provides that

material failing the first two prongs which also, "when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value" will be deemed obscene. Objection is taken to the phrase "in the context in which it is used."

Were this language found in either the first or second prongs, which are the province of the jury and already highly subjective in nature, this modification of *Miller* might prove more troubling. In the first prong, the question would be whether material was prurient "in the context in which it is used." In the second, the question would be whether such matter was depicted in a patently offensive manner "in the context in which it is used." As plaintiffs point out, it is possible to conceive of situations in which this phrase could add yet another speculative factor. *United States v. Various Articles*, 600 F.2d 394 (2d Cir. 1979), *But see Ward v. Illinois*, 431 U.S. 767, 770 n.1, 97 S.Ct. 2085, 2088 n.1, 52 L.Ed.2d 738 (1977) contextual test approved by implication).

However, such is not the case here. By inserting the phrase in the third prong, *i.e.*, the objective test, this language, if anything, serves a limiting function and enhances the specificity with which a trial court must address the existence of literary, artistic, political, or scientific value. Viewed from another angle, it is difficult to see how the redeeming value of ostensibly obscene material can be "considered as a whole" without at the same time looking at the context. *See generally, Pinkus v. United States*, 436 U.S. 293, 303-04, 98 S.Ct. 1808, 1814-15, 56 L.Ed.2d 293 (1978).

For the foregoing reasons, I conclude that Washington's statutory scheme comports with the minimum requirements of *Miller* insofar as HB 626 sets forth substantive testing procedures in a constitutionally acceptable framework.

II. PROCEDURAL ASPECTS

A. Prior Restraint

Unquestionably, prior restraint of expression has long

and consistently been viewed with deep and abiding suspicion. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13, 100 S.Ct. 1156, 1161 n.13, 63 L.Ed.2d 413 (1980) and authorities cited therein. In considering argument raising the spectre of such restraint, however, there is a basic premise which should be borne in mind:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. *These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality* . . .

Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957) (emphasis original) quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S.Ct. 766, 769-69, 86 L.Ed. 1031 (1942).

[6, 7] It is now settled beyond dispute that obscenity stands outside the umbrella of the Constitution. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69, 93 S.Ct. 2628, 2641, 37 L.Ed.2d 446 (1973). As unprotected activity, lawfully punishable by sanctions, the promotion of obscenity stands in no different posture than would any other activity inimical to the public interest and subject to criminal penalties. It is beyond argument that a primary objective of sanctions is that of deterrence. Thus, if plaintiffs feel that HB 626 serves as a prior restraint on their ability or willingness to engage in activities proscribed under the statute, then it can only be concluded that the Act will serve its intended, and lawful, purpose.

[8] Such a construction, however, is an oversimplification, since the thrust of plaintiffs' argument is that the existence of HB 626 may have an inhibitory effect on protected activity as well as unprotected. The burden of drawing what may often be a fine line between the two, it is contended, will fall upon them; and an error in judgment

may result in prosecution prior to an adjudication of obscenity, or in self-imposed censorship.

The flaw in this approach is that it is predicated on the assumption that one cannot make an initial determination as to the nature of a given work and is at the mercy of a post facto adjudication. As a corollary, a further assumption is implied that the test for obscenity is so vague and unfathomable that it serves no definitive purpose. I am unable to so conclude. For reasons stated previously, HB 626 comports with the substantive standard enunciated by *Miller*. Undoubtedly, "the line between legitimate and illegitimate speech is often ... finely drawn." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975). Nonetheless, it is not the function of this Court to cast doubts upon the efficacy of a Supreme Court decision which has stood the test of time without major modification. For the same reasons which validate a jury's ability to render a rational determination of obscenity, one charged with promotion is equally able to reach his own decision. "Simply stated, hard core pornography ... can and does speak for itself." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6, 93 S.Ct.2628, 2634 n.6, 37 L.Ed.2d 446 (1973) quoting with approval, *United States v. Wild*, 422 F.2d 34, 36 (2d Cir. 1970), *cert. denied*, 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971). Subjective variables are most certainly present in reaching such a determination, but these are no more imponderable than those representing elements of any number of malum prohibitum offenses.

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense ... The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite

> warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-42, 91 L.Ed. 1877 (1947) (citations omitted).

Nor does placing the burden of prior determination upon the promoter present any insurmountable difficulty:

> The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.

Mishkin v. New York, 383 U.S. 502, 511, 86 S.Ct. 958, 964, 16 L.Ed.2d 56 (1966). The statutory scheme defining scienter approved in *Mishkin* parallels section 1(1) of HB 626 and I am satisfied that the Act meets minimum constitutional requirements in this regard.

B. Civil Penalty

[9] As an initial proposition, there is no per se constitutional constraint against the imposition of civil sanctions for obscenity-related offenses:

> We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts [a state] to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislator's range of choice. If [a state] chooses to subject persons who disseminate obscene "literature" to criminal prosecution and also to deal with such books as deodands of old, or both, *with due regard, of course, to appropriate opportunities for the trial of the underlying issue*, it is not for us to gainsay its selection of remedies.

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441, 77 S.Ct.

1325, 1327, 1 L.Ed.2d 1469 (1957) (citations omitted) (emphasis added).

The highlighted language is the crux of the problem. If HB 626 dealt with injunctive procedures, arguably of a prior restraint nature and subject to judicial enforcement through contempt proceedings there would be a wealth of case law against which to weigh the propriety of the Act. *E.g., Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980: *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). If the statute envisioned a system of administrative controls, such as licensing, there would likewise exist dispositive Supreme Court decisions. *E.g. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

Here, however, the statute is in the nature of what *Kingsley* refers to as a *qui tam* action and this court is largely without precedential guidance. One thing is certain. There can be no deviation from the tripartite *Miller* test:

> While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54, 93 S.Ct. 2628, 2633, 37 L.Ed.2d 446 (1973).

While *Paris* concerned an injunctive action, I think it unmistakable that in any adjudication of obscenity, there can be only one criteria, and that is as set forth in *Miller*. H.B. 626 satisfies this requirement in that section 1 thereof is fully applicable to both civil and criminal phases of the Act.

Nor does application of rules of evidence or civil procedure present cause for concern since section 3(3) provides that:

> The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: *Provided,* That the standard of proof on the issue of obscenity shall be clear, cogent, and convincing.[5]

[10] Further, although far from a settled issue, a civil action should require the same element of scienter as is mandated in criminal prosecution. *Grove Press, Inc. v. Flask,* 326 F.Supp. 574, 578 (N.D.Ohio 1970), *vacated on other grounds,* 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973). Once again, HB 626 satisfies this requirement. *See* §§ 1(1); 4(2).

Two remaining areas are somewhat disconcerting. The first involves the use of a jury as a finder of fact:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

Miller, supra, 413 U.S. at 26, 93 S.Ct. at 2616 (1973).

It is ture that the *Miller* Court was addressing criminal prosecutions in drafting the foregoing, but it is also true that if this language were to be construed as applying *only* to criminal actions, it would be both gratuitous and superfluous. The same rationale which mandates the jury system as the most accurate barometer of contemporary community standards applies with equal force in the civil arena. The wording of section 3(3) would imply that it was the legislative intent to preserve a defendant's access to the jury. Nonetheless, I am troubled by the possibility that Washington's Constitution may not necessarily mandate such a result.

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[5]Within the civil context, the evidentiary standard of "clear, cogent and convincing" is constitutionally adequate. *Cooper v. Mitchell Bros. Santa Ana Theatre,* 454 U.S. 90, 102 S.Ct. 172, 70 L.Ed.2d 262 (1981).

> Under Const. art 1, § 21, the right of trial by jury shall remain inviolate. . . . In civil cases, a jury is available if a statute so provides or if the matter is one which was triable before a jury when the constitution was adopted.

State v. Anderson, 94 Wash.2d 727, 728, 620 P.2d 76 (1980). *See also* Wash.Ct.R. (Cr) 38(a).

Whether Washington courts would ultimately determine that a *qui tam* action such as contemplated under HB 626 "was triable before a jury when the [state] constitution was adopted" is a matter yet unsettled. In passing upon the constitutionality of the Act vis a vis the question of trial by jury in civil prosecutions, I do so with the understanding that the legislature incorporated such right through the wording of § 3(3).

A second area of concern lies in § 4(2) which provides:

> Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

Plaintiffs characterize this section as allowing for unlimited fines which could potentially close an establishment's doors as effectively as would a padlock. It is contended that such potential carries with it all the hallmarks of prior restraint. I am not persuaded. For reasons already stated, sanctions imposed after an adjudication of obscenity affect only accomplished behavior and do not rise to the level of either prior restraint or an impermissible chilling effect. In summarizing previous discussion, the following quote is appropriate.

> [P]laintiffs attack the state statutory scheme as imposing unnecessarily broad and sweeping penalties on the distribution of obscene matter in order to chill the dissemination of borderline protected materials. We disagree. The penalties in the instant scheme are only

> to be imposed after a full adversary hearing and a judicial determination on the merits. No penalty will be imposed unless the materials are adjudicated or admitted to be obscene and the requisite scienter was present. . . .
>
> The cases cited by plaintiffs are inapposite. . . . Each of these cases involves penalties or burdens being placed by administrative bodies upon an individual exercising his First Amendment rights. [This statute] specifically requires an adversary hearing and a judicial determination before any speech or material may be enjoined or any penalties imposed.

Grove Press, supra, 326 F.Supp. at 579-80 (citations omitted).

Further, contrary to plaintiffs' assertion, a penalty, while not circumscribed in terms of dollars, is limited in a sufficiently concrete manner to avoid any Fifth Amendment "taking" issue. The statute clearly provides that in imposing a penalty, the court must have in mind both "the willfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance." Section 4(2). So prescribed, the rationale of *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) is instructive. In considering the constitutionality of forfeiture of property used in transporting contraband, the Court first reviewed historical development of the "deodand" concept, then held that the modern counterpart found in forfeiture statutes serves appropriate "punitive and deterrent purposes . . . . both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 686-87, 94 S.Ct. at 2093-94. The same motivating rationale is eminently served by forfeiture of illegal profits in the instant case.

[11] This is not a situation where a trial court may act with unlimited discretion and without predefined and objectivity articulated standards. Rather, the court must ascertain the nature and extent of ill-gotten gains, *after* an adjudication of illegality, and impose penalties accord-

ingly. The underlying purpose of such fines thus bears a rational relationship to the activity sought t be proscribed, and is entirely within legitimate parameters of the state's police powers. In summary, the purpose is:

> not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means.

State ex rel. Kidwell v. United States Marketing, Inc., 102 Idaho 451, ——, 631 P.2d 622, 628 (1981), *appeal dismissed per stip.*, —— U.S. ——, 102 S.Ct. 1649, 71 L.Ed.2d 878 (1982).

Considering both the existence of a reasonable nexus between the activity sought to be interdicted and the means chosen to accomplish that end, and the fact that penalties are levied only after a full adversary hearing accompanied by the panoply of procedural safeguards, the hollowness of plaintiffs' position in the instant case is well illustrated by the following quotation from *Kidwell.*

> [I]f a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state imposed an unlawful prior restraint upon his bookselling activities. If the same bookseller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it has that effect.
>
> * * * * * * * *
>
> Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity.

Id. at ——, 631 P.2d at 627-28[6]

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[6]The Statute approved in *Kidwell* goes far beyond the sanctions contemplated in HB 626 providing, as it does, for a one year closure of any establishment found to be a moral nuisance.

c. Criminal Penalty

It is argued that stiff criminal penalties of up to $50,000 per violation run afoul of both equal protection and cruel and unusual punishment prohibitions. The well-settled rule is that:

> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.
>
> * * * * * * * *
>
> [F]or crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel v. Estelle, 445 U.S. 263, 272-74, 100 S.Ct. 1133, 1138-39, 63 L.Ed.2d 382 (1980).

[12] Legislative authority is not wholly free of restraint, of course. Where a punishment is completely without a rational nexus to legitimate social goals, the principal of proportionality may be applicable. *Id.* at 274 n.11, 100 S.Ct. at 1139 n.11; *see also Coker v. Georgia,* 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). The key, therefore, to the validity of a given punishment lies in the magnitude of societal interest at stake.

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.
>
> * * * * * * * *
>
> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to

> jeopardize, in Mr. Chief Justice Warren's words, the States' "right ... to maintain a decent society."

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63-69, 93 S.Ct. 2628, 2638-2641, 37 L.Ed.2d 446 (1973).

[13] In view of the state's compelling interest in controlling commercial obscenity, I conclude that there is a rational connection between the criminal penalties contemplated in HB 626 and the governmental objective of regulating pornography. It is well within the prerogative of the legislature to impose sanctions which are more than merely a cost of doing business.

III. STATE CONSTITUTIONAL QUESTIONS

A. More than one subject in title:

Article 2, Section 19 of the Washington State Constitution provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." It is argued that HB 626, which relates to both pornography and moral nuisance, must be struck down as an impermissible joinder of discrete subjects. The Washington judiciary has never read the applicable provision so narrowly.

> We do not agree that the initiative covers a multiplicity of subjects or subjects that are not reasonably related. On the contrary, each of the subtopics of [the initiative] bears a close interrelationship to the dominant intendment of the measure. We have repeatedly held that
>
> > where the title embraces a general subject it is not violative of the constitution even though the general subject contains incidental subjects. All that is required is that there be some "rational unity" between the general subject and the incidental subdivision. *Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wn.2d 392, 418 P.2d 443 (1966); *Robison v. Dwyer*, 58 Wn.2d 576, 364 P.2d 521 (1961).
>
> *Water Dist. 105 v. State, 79 Wash.2d 337, 341, 485 P.2d 66 (1971).*

Fritz v. Gorton, 83 Wash.2d 275, 290, 517 P.2d 911, 920-21 (1974).

Even where the subjects at issue might be discrete if viewed in the abstract, it is incumbent upon the court to go a step further and take a practical construction of such subjects in light of the scope of a given measure. *Goodner v. Chicago, Mil Etc. R. Co.*, 61 Wash.2d 12, 23, 377 P.2d 231, 237-38 (1962). Stated another way, it is the legislative *purpose* which is the critical focal point, and:

> all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title.

Gruen v. State Tax Comm., 35 Wash.2d 1, 22-23, 211 P.2d 651, 664 (1949).

More concretely yet, the Washington Supreme Court has held that:

> To constitute plurality of subject, an act must embrace two or more *dissimilar and discordant* subjects, that by no fair intendment can be considered as having any legitimate connection with or relation to each other. Within the meaning of the constitutional provision, matters which apparently constitute distinct and separate subjects are not so where they are not incongruous and diverse to each other.
>
> *Casco Co. v. Public Util. Dist. No. 1*, 37 Wash.2d 777, 790-91, 226 P.2d 235, 242 (1951).

> [14] The purpose of a title is to put interested persons on notice of the subject matter in a manner sufficient to prompt "inquiry into the body of the act" if one should wish to do so; and where "a title is broad and comprehensive, it will be liberally construed." *State v. Charboneau's*, 27 Wash.App. 5, 9-10, 615 P.2d 1321, 1324, *rev. denied*, 94 Wash.2d 1021 (1980). *See also State v. Winters*, 67 Wash.2d 465, 466, 407 P.2d 988, 989 (1965).

[15] I am unable to conclude that pornography and moral nuisances are so discordant and inimical to one another as to be without "rational unity." Indeed, under the language of section 2 of HB 626, it would appear that the

former is subsumed into the latter. Certainly the title is "broad and comprehensive" enough to put any reasonable legislator on notice as to the nature and scope of the law. A constitutional challenge based on Article 2, section 19 must therefore fail.

B. Emergency Clause

During the height of the populist movement in 1912, the electorate adopted amendment 7 to the state constitution which provided, *inter alia,* for reservation of the power of referendum.

> The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing institutions . . .

Wash. Const. art. 2, § 1(b). *See generally Fritz v. Gorton,* 83 Wash.2d 275, 279-84, 517 P.2d 911, 915-17 (1974); *State ex rel. Blakeslee v. Clauser.*, 85 Wash. 260, 264 *et seq.*, 148 Pac. 28, 30 *et seq.* (1915) for an historical and philosophical perspective on direct legislation.

Analytical emphasis has ebbed and flowed over the course of time depending upon the complement of the court at any given historical moment and the comparative trust members of the judiciary placed in the legislature vis a vis the electorate. Perhaps nothing has changed since the following observation issued some sixty-seven years ago:

> There has been a wide inconsistency in the holding of the courts upon constitutional questions. They have declared that, where the legislature has said there is an emergency, although undefined, its declaration is final and conclusive upon all. At the same time, and in the same day, they have not hesitated to declare acts of the legislature to be in derogation of the fundamental law or some of the legislative limitations of the constitution.

State ex rel. Brislawn v. Meath, 84 Wash. 302, 307, 147 Pac. 11, 13 (1915).

While as a practical matter the foregoing may still carry a ring of truth, there has been a decided shift in recent years away from a presumption of constitutionality of emergency legislation in favor of exploring the factual foundation supporting a declaration of emergent circumstances. Just twenty years ago, the firm rule was:

> With regard to the weight to be given such clauses [of the existence of an emergency], the rule to which this court has most consistently adhered, is that most recently stated in *State ex rel. Pennock v. Coe*, 42 Wn.(2d) 569, 257 P.(2d) 190, quoting from *State ex rel. Pennock v. Reeves*, 27 Wn.(2d) 739, 179 P.(2d) 961:
>
> > . . . such legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its face is obviously false; and, in determining the truth or falsity of the legislative declaration, we will enter upon no inquiry as to the facts, but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.(2d) 1. We must give to the action of the legislature and its declaration of an emergency every favorable presumption.

State ex rel. Hoppe v. Meyers, 58 Wash.2d 320, 326, 363 P.2d 121, 125 (1961).

This rule was questioned in *State ex rel. Humiston v. Meyers*, 61 Wash.2d 772, 380 P.2d 735 (1963). In reviewing precedent, the court noted that:

> The touchstone of the rule is ". . . what appears upon the face of the act, aided by the court's judicial knowledge."
>
> The face of the act [in this case] is patently devoid of any facts relating to an emergency (with the exception of the emergency clause itself). The act repeals nothing; it appropriates nothing; it taxes nothing. In nowise is the act comparable to the act

> considered by the court in *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 23 P.(2d) 1 (1933), wherein the acts recited *facts* showing an emergent situation, which facts were, for the most part, capable of judicial knowledge. We do not indicate that the inclusion of a legislative declaration of policy in an act would, ipso facto, remove the emergency clause from the ambit of the court's constitutional duty to project and test the clause upon the backdrop of the constitution.

Id. at 778, 380 P.2d at 739.

[16] Intermediate appellate courts have since picked up the *Humiston* approach and refined its thrust more narrowly.[7] Bypassing the line of authority relied upon in *Hoppe v. Meyers, supra*, the court in *Swartout v. City of Spokane*, 21 Wash.App. 665, 586 P.2d 135 (1978), *rev. denied*, 91 Wash.2d 1023 (1979) reached back in time to offer the following elucidation:

> [I]t [is] too clear to require argument that the legislature cannot defeat the constitutional right, reserved by the people [the right of referendum] .... by *merely* inserting in an act the [language contained in the exception] ....
>
> * * * * * * * *
>
> Such a label may obviously be utterly and completely false. It would be scandalous indeed if the constitutional right of referendum could be thwarted by the mere use of false labels. As was said in argument, "If this can be done, the right of referendum is a dead letter in this state."

Id. at 672, 586 P.2d at 140 quoting *State ex rel. Kennedy v. Reeves*, 22 Wash.2d 677, 681-82, 157 P.2d 721, 723 (1945).

The essence of the *Swartout* decision is twofold: a declaration of emergency must contain basic underlying

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[7]Federal courts may rely upon intermediate appellate decisions where it is reasonable to assume that such opinions present the current status of state law. *See Tomlin v. Boeing*, 650 F.2d 1065, 1069 n. 7 (9th Cir. 1981).

facts supporting a statement of urgency;[8] and any legislation passed in derogation of the people's right to referendum is void *ab initio*.[9]

City of Spokane v. Harris, 25 Wash.App. 345, 606 P.2d 291 (1980) is the most recent decision on point. Expanding upon and explaining its holding in *Swartout*, the court in effect restated the *Humiston* approach with a measure of clarity which leaves no doubt as to how HB 626 must be construed.

> Whether a law is necessary for the immediate preservation of the public's health, safety and welfare is not so readily determined by looking to the law's subject matter. There must be a statement of some underlying fact to support the emergency or other facts of which the court can take judicial notice. This is particularly so in this case where the [previous] ordinance has been in effect 58 years before being amended.

25 Wash.App. at 348, 606 P.2d at 292.

Despite the wide swings evidenced in judicial thought over the course of years, what we have here is not so much a radical shift in substantive analysis as it is a shifting of the burden of persuasion. The standard rule adopted by Washington concerning challenges to constitutional validity of a statute is that "there is a presumption of the constitutionality of the legislative enactment unless its repugnancy to the constitution clearly appears or is made to appear *beyond a reasonable doubt*." *Water Dist. 105 v.*

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[8]Lest a false impression be left, it should be noted that the Court was construing the City's charter which specified that emergency legislation must contain a "statement of urgency." The state constitution requires no such statement; only that the act be *in fact* of an emergent nature. The decision is cited primarily for its interest as a point of transition to the analysis employed in *City of Spokane v. Harris*, *infra*.

[9]The City's case was probably not helped by its display of incredible arrogance. In a letter to appellant, corporation counsel contended that:

> The charter does not require an emergency to exist when an ordinance is passed to become immediately effective. It merely requires that the council declare that an emergency exists.

21 Wash.App. at 671, 586 P.2d at 140.

State, 79 Wash.2d 337, 340, 485 P.2d 66, 68 (1971) (emphasis added). Given the reasoning of the line of cases surveyed, however, this rule of construction would appear not to obtain where the electorate's right to referendum is at issue. The basis for this deviation is simple enough.

> All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Wash Const. art. 1, § 1.

[17] Thus, where a conflict arises between the source of political authority (the people) and that body to which such power has been delegated (the legislature), there is no rule of reason which dictates that derivative powers be accorded weight over the primary source of such authority.[10] The burden in the instant case is upon the defendants. The weight of that burden is largely an unsettled question.

HB 626 is clear on its face that it contains no recitation of underlying facts upon which any court could glean any indication of legislative intent in declaring an emergency. Section 10 is nothing more than the most conclusory and cursory attempt to use "magic words" at the expense of supporting facts. Thus, if the act is to be saved at all, it will only be through resort to information of which the court may take judicial knowledge.[11]

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[10]In making this observation, I am aware of the longstanding rule in Washington that:

> there is a distinct difference between the operative effect of the Federal constitution and that of a state constitution. The Federal constitution is a *grant* of power, whereas the state constitution is a *limitation* upon legislative power.

Union High School Dist. No. 1 v. The Taxpayers Etc., 26 Wash.2d 1, 7, 172 P.2d 591, 594 (1946). The quotation is frequently found in decisions resolving conflicts among the three branches of government. *See, e.g., Moses Lake Dist. v. Big Bend College*, 81 Wash.2d 551, 503 P.2d 86 (1972); *Yelle v. Bishop*, 55 Wash.2d 286, 347 P.2d 1081 (1959).

Where a direct conflict arises between the general authority of the legislature and the reserved power of the electorate, the difference between a "grant" and a "limitation" may not be so distinct. The plurality decision in *Ford v. Logan*, 79 Wash.2d 147, 483 P.2d 1247 (1971) is worth reading in this regard.

[11]Judicial notice, of which the court may take cognizance, is com-

Therein lies a unique dilemma. Defendants have posited no source materials of which this Court may take judicial notice except for certain materials of which are clearly outside the ambit of the Washington rule, *e.g.*, newspaper clippings; and reference to the history underlying the ill-fated Initiative 335 which tends to be somewhat less than conclusive on the issue.[12] Briefly stated, I have no basis upon which to read requisite supporting facts into HB 626 which are sorely lacking on its face. Having concluded that at least the burden of production, if not persuasion, in this area rests with the defendants, it would necessarily follow that the Act is constitutionally deficient as a matter of state law.

In the interest of preserving judicial federalism, however, I am hesitant to pass upon a question which is peculiarly local in nature and which is of such obvious importance to legitimate societal interests of the state. *See Lehman Brothers v. Schein*, 416 U.S. 386, 390-91, 94 S.Ct. 1741, 1743-44, 40 L.Ed.2d 215 (1974). In anticipation of this dilemma, defendants have suggested in argument that the validity of the emergency clause be determined by the Washington Supreme Court pursuant to the Federal Court

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posed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. The court may "... resort to encyclopedias, authoritative works upon the subject, reports of committees, scientific bodies, and any source of information that is generally considered accurate and reliable ...."

State ex rel. Humiston v. Meyers, 61 Wash.2d 772, 779, 380 P.2d 735, 739-40 (1963). *See also Tyler Pipe Indus. v. Dept. of Revenue*, 96 Wash.2d 785, 796, 638 P.2d 1213, 1218 (1982).

[12]The Initiative was passed by the voters on November 8, 1977 and subsequently struck down as unconstitutional in *Spokane Arcades v. Ray*, 449 F.Supp. 1145 (E.D.Wn.1978), *aff'd sub nom. Spokane Arcades v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd* 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981). Defendants ask this Court to take notice of the history of this measure as evidence of long standing state interest in the field of pornography and the need for decisive action upon exhaustion of the appellate process.

This position is not without merit, but in and of itself is insufficient to compensate for the dearth of underlying facts on the face of the Act.

Local Law Certificate Procedure Act codified at R.C.W. ch. 2.60. The relevant statute is as follows:

> When in the opinion of any federal court below (sic) whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding *and the local law has not been clearly determined,* such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

R.C.W. 2.60.020 (emphasis added).

In the interests of economy as well as efficacious and final resolution, the certification avenue, at first glance, appears inviting. Upon reflection, however, utilization of this statute would clearly be an impermissible short cut. The essential bar lies in the requirement that the local law be unsettled. *Id.; see also Estate of Madsen v. C. I. R.*, 659 F.2d 897, 899 (9th Cir. 1981).

[18] For reasons already given, I see nothing unsettled or uncertain about Washington's current analysis of the legal issue. The approaches embodied in *Humiston, supra* and *Harris, supra* are abundantly clear as to the prevailing judicial thought in Washington. Were this matter to be certified, therefore, the question placed before the State Supreme Court would not be one of law, as contemplated by the statute, but one of fact, *i.e.*, what facts are, or should be, available to the Court as a matter of judicial knowledge.[13] Should the state Supreme Court wish to assume the role of an original fact-finding body, that is well within its prerogative. *State ex rel. Distilled Spirits Inst. v. Kinnear*, 80 Wash.2d 175, 187, 492 P.2d 1012, 1019 (1972). I am not inclined however, to cast that Court into what may be an unwanted, unwarranted, and arguably inappropriate role.

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[13]Strictly speaking, such an inquiry would be a mixed question of fact and law reviewable as a question of law. *See Leschi v. Highway Comm'n*, 84 Wash.2d 271, 283-84, 525 P.2d 774, 783 (1974). Nonetheless, the Court would still be in a posture of seeking out and weighing external facts in an original capacity.

Faced with conflicting policy goals of proceeding to final resolution and allowing the state judiciary to chart its own position on a matter comprised solely of state questions free of outside interference, I defer to the latter. The litigants may yet reap the benefits of both of these goals by employing the Declaratory Judgments Act codified at R.C.W. ch. 7.24.

IV. CONCLUSION

In summary, I conclude that HB 626 satisfies constitutional criteria as a matter of federal law subject to the reservation that the right to trial by jury may not be infringed in civil prosecutions. Because I interpret legislative intent in drafting the bill as mandating the same result, I need not reach any issues concerning severability.

With respect to the question of whether inclusion of the emergency clause violates prescriptions of the Washington constitution, this is a matter best left to ultimate resolution by the state judiciary.

Accordingly, plaintiffs' prayer for injunctive relief is DENIED. An appropriate Order directing entry of judgment will follow.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED IN THE
U.S. DISTRICT COURT
Eastern District of Washington
APR 18, 1984
J. R. FALLQUIST, Clerk
_____ Deputy

J-R DISTRIBUTORS, INC., et al.,
Plaintiffs-Appellants,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,
Defendants-Appellees.

82-3441, 82-3442, 82-3500, 82-3501, 82-3502, 82-3503, 82-3504
No. _____

DC CV 82-230, 82-231, 82-240, 82-239, 82-354, 82-223, 82-283 RJM

APPEAL from the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the _____ judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered February 06, 1984.

A TRUE COPY
ATTEST APR 16, 1984
PHILLIP B. WINBERRY
/s/ _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 06, 1984
PHILLIP B WINBERRY
Clerk, U.S. Court of Appeals

NO. 82-3441

D.C. NO. CV 82-230
(Eastern District of Washington)

J-R DISTRIBUTORS, INC.
Plaintiff-Appellant,

vs.

KENNETH EIKENBERRY, etc., et al.,
Defendants-Appellees.

NO. 82-3442

D.C. NO. CV 82-231
(Eastern District, Washington)

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,
Plaintiff-Appellant,

vs.

KENNETH EIKENBERRY, etc., et al.,
Defendants-Appellees.

NO. 82-3500

D.C. NO. CV 82-240
(Eastern District, Washington)

JACK R. BURNS, etc.,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, etc.,
Defendant-Appellee.

NO. 82-3501

D.C. NO. CV 82-239
(Eastern District, Washington)

PLAYTIME THEATERS, INC., etc.,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, etc., et al.,

Defendants-Appellees.

NO. 82-3502

D.C. NO. CV 82-354
(Eastern District, Washington)

KUKIO BAY PROPERTIES, INC., etc.,

Plaintiff-Appellant,

VS.

NORM MALENG, etc.,

Defendant-Appellee.

NO. 82-3503

D.C. NO. CV 82-223
(Eastern District, Washington)

SPOKANE ARCADES, INC., etc.,

Plaintiff-Appellant,

VS.

THE HONORABLE KENNETH EIKENBERRY, etc., et al.,

Defendants-Appellees.

NO. 82-3504

D.C. NO. CV 82-283
(Eastern District, Washington)

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, et al.,

Plaintiff-Appellants,

VS.

THE HONORABLE KENNETH EIKENBERRY, etc.,

Defendant-Appellee.

ORDER

Before: GOODWIN, WALLACE, and REINHARDT, Circuit Judges.

Judges Goodwin and Reinhardt have voted to deny the pet .on for rehearing, and Judge Wallace has voted to grant the petition for rehearing. The panel has unanimously voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 21, 1984
PHILLIP B WINBERRY
Clerk, U.S. Court of Appeals

NO. 82-3441
D.C. NO. CV 82-230

J-R DISTRIBUTORS, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants-Appellees.

NO. 82-3442
D.C. NO. CV 82-231

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,

Defendants-Appellees.

NO. 82-3500
D.C. NO. CV 82-240

JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,
Defendant-Appellee.

NO. 82-3501
D.C. NO. CV 82-239

PLAYTIME THEATRES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity, only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,
Defendants-Appellees.

NO. 82-3502
D.C. NO. CV 82-354

KUKIO BAY PROPERTIES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,
Defendant-Appellee.

NO. 82-3503
D.C. NO. CV 82-223

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants-Appellees.

NO. 82-3504
D.C. NO. CV 82-283

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON,
Plaintiffs-Appellants,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Kenneth O. Eikenberry, in his official capacity as Attorney General for the State of Washington, the defendant-appellee above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion reversing the decision of the United States District Court for the Western District of Washington. The decision of the District Court held the challenged Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 19th day of June, 1984.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
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(206) 753-6228

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 82-3441, 82-3442
& 82-3500 thru 82-3504

DC# CV 82-230 RJM

J-R DISTRIBUTORS, INC., et al.,

Plaintiffs-Appellants,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Defendants-Appellees.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed this 18th day of June, 1984, to:

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CHRISTINE O. GREGOIRE
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 25 1984
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

NO. 82-3441
D.C. NO. CV 82-230

J-R DISTRIBUTORS, INC.,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, and FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington,

Defendants-Appellees.

NO. 82-3442
D.C. NO. CV 82-231

AZURE ENTERTAINMENT CORPORATION OF WASHINGTON,

Plaintiff-Appellant,

VS.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; and JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington,

Defendants-Appellees.

NO. 82-3500
D.C. NO. CV 82-240

JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS,

Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

NO. 82-3501
D.C. NO. CV 82-239

PLAYTIME THEATRES, INC., a Washington Corporation,

Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity, only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only,

Defendants-Appellees.

NO. 82-3502
D.C. NO. CV 82-354

KUKIO BAY PROPERTIES, INC., a Washington Corporation,

Plaintiff-Appellant,

vs.

NORM MALENG, Prosecuting Attorney of King County, in his representative capacity only,

Defendant-Appellee.

F-3

NO. 82-3503
D.C. NO. CV 82-223

SPOKANE ARCADES, INC., a Washington Corporation,
Plaintiff-Appellant,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only, DONALD C. BROCKETT, Prosecuting Attorney of Spokane County, in his representative capacity only, and JAMES SLOANE, Spokane City Attorney, in his representative capacity only,

Defendants-Appellees.

NO. 82-3504
D.C. NO. CV 82-283

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON,
Plaintiff-Appellants,

vs.

THE HONORABLE KENNETH EIKENBERRY, as Attorney General of the State of Washington, in his representative capacity only,

Defendant-Appellee.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Kenneth O. Eikenberry, in his official capacity as Attorney General for the State of Washington, the defendant-appellee above named, hereby appeals to the Supreme Court of the United States from the April 6, 1984 order denying petition for rehearing of the 2-1 opinion reversing the decision of the United States District Court for the Eastern District of Washington. The decision of the District Court held the challenged anti-obscenity Washington State statute to be constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 22nd day of June, 1984.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 82-3441, 82-3442
& 82-3500 thru 82-3504

DC# CV 82-230 RJM

J-R DISTRIBUTORS, INC., et al.,

Plaintiffs-Appellants,

vs.

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Defendants-Appellees.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States has been served upon counsel by placing the same in the United States mail, postage prepaid, propery addressed this 22nd day of June, 1984, to:

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/s/ _____
CHRISTINE O. GREGOIRE
Deputy Attorney General

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

NEW SECTION. Sec. 2. The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

NEW SECTION. Sec. 3. Any of the following parties may bring a civil action in the superior court of any county where a moral nuisance is alleged to have been maintained:

(1) The prosecuting attorney for the county where the alleged moral nuisance is located;

(2) The city attorney for the city where the alleged moral nuisance is located; or

(3) The attorney general.

The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: PROVIDED, That the standard of proof on the issue of obscenity shall be clear, cogent, and convincing evidence.

NEW SECTION. Sec. 4. (1) No person shall with knowledge maintain a moral nuisance.

(2) Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

NEW SECTION. Sec. 5. All civil penalties assessed under section 4 of this act shall be paid into the general treasury of the governmental unit commencing the civil action.

NEW SECTION. Sec. 6. Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision.

NEW SECTION. Sec. 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 7 RCW.

NEW SECTION. Sec. 8. This is added to chapter 9.68 RCW a new section to read as follows:

A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment prescribed for that class of felony, except that upon conviction of promoting pornography the court shall impose a fine of not less than

five thousand dollars per count nor more than fifty thousand dollars per count. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

NEW SECTION. Sec. 9. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 10. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.